Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

ROYAL BENSON, M.D., ET AL.,
Petitioners,

v.

ST. JOSEPH REGIONAL HEALTH CENTER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 25, 2009

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit Court of Appeals erred in concluding, contrary to the law of this Court and other circuits first set forth in *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, that a legal issue presented in a Federal Rule of Civil Procedure 59(e) motion was not properly before the district court where the motion was filed within ten days of a new or amended judgment.

II. Whether the Fifth Circuit Court of Appeals erred in concluding, on an issue that is one of first impression for this Court, that a legal argument presented in a Rule 59(e) motion was not properly before the District Court where the motion was not proffered to extend the appellate deadlines and was filed prior to the filing of a timely notice of appeal.

III. Whether the Fifth Circuit Court of Appeals erred in concluding that a Rule 59(e) motion constituted an impermissible, successive motion where the motion was filed within ten days of the final judgment entered by the district court.

IV. Whether the Fifth Circuit Court of Appeals erred in failing to recognize that the district court's ruling that clear and convincing is the proper standard of proof for proving malice to defeat immunity under the Texas Medical Practice Act constituted plain error where the Texas Supreme Court has established preponderance of the evidence as the standard

of proof for proving malice as an element of the plaintiff's cause of action.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

The Petitioners here and appellants below are Royal Benson, M.D. and Benson OB/GYN Center, P.A.

The Respondents here and appellees below are St. Joseph Regional Health Center; St. Joseph Health System; Franciscan Services Corporation; The Sisters of St. Francis of Sylvania, Ohio; Betty G. Acker, MD; Daniel Buche; Dr. Thomas W. Davis, Jr.; Dr. Daniel B. Dawson; Dr. David R. Doss; Dr. Robert H. Emmick, Jr.; Gretchen Kunz; Dr. G. Mark Montgomery; RN Myesha Nichols-Turner; Dr. William F. Price; Alan C. Smith; Kathleen A. Thomas.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Benson OB/GYN Center, P.A. has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in the Benson OB/GYN Center, P.A.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 575 F.3d 542 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a. An order denying rehearing and rehearing *en banc* is reported at 581 F.3d 243 and is reprinted at Pet. App. 65a, 67a. The District Court's Memorandum and Order dated March 22, 2007, Memorandum and Order dated August 22, 2007, second Memorandum and Order dated August 22, 2007, and Memorandum and Order dated October 22, 2007 are unreported and are reprinted at Pet. App. 35a, 23a, 21a, and 18a, respectively.

JURISDICTION

Petitioners seek review of a final decision of the United States Court of Appeals for the Fifth Circuit entered on July 10, 2009. The Court of Appeals entered its order denying rehearing and rehearing *en banc* on August 27, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Health Care Quality Improvement Act, 42 U.S.C. § 11112 ("HCQIA"); the Texas Occupations Code, TEX. OCC. CODE § 160.010 ("TMPA"); Federal Rule of Civil Procedure 59(e); and the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq*. The relevant provisions are reproduced at Pet. App. 69a.

STATEMENT OF THE CASE

A. District Court Jurisdiction.

Pursuant to Supreme Court Rule 14.1(g)(ii), the court of first instance, the United States District Court for the Southern District of Texas, Houston Division (the "District Court"), had jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337, and 1367(a).

B. Factual Background.

Dr. Benson joins the Brazos Valley Women's Center.

In January 1992, Dr. Royal Benson joined the Brazos Valley Women's Center (the "BVWC"), a prominent local Obstetrics and Gynecological (OB/Gyn) practice group, as an associate physician. Over the course of the next four and a half years, Dr. Benson successfully grew his practice and became a partner in the practice group. Eventually, personal and professional disagreements led Dr. Benson to leave the BVWC and opened his own practice, in competition with the BVWC. Dr. David Doss, a physician at the BVWC, threatened Dr. Benson by declaring that he would "run [Dr. Benson] out of town." Dr. Doss then sent a letter to local physicians threatening to cease referring patients to any physician who referred their patients to Dr. Benson.

Dr. Benson requests conflict-free peer review, but his requests are ignored.

In 1999, Dr. Benson met with Sister Gretchen Kunz, the CEO of the St. Joseph Health System, and

Dan Buche, the CEO of St. Joseph Regional Health Center ("SJRHC"), regarding the participation of Dr. Benson's former associates at the BVWC in Dr. Benson's peer review proceedings at SJRHC. Dr. Benson was assured that he would receive conflict-free peer review by the exclusion from his reviews of Respondents Drs. Betty Acker, David Doss, Mark Montgomery, Daniel Dawson, and other physicians associated with the BVWC.

However, between May 2000 and August 2001, several then present, or former, physicians associated with BVWC actively participated in either the selection of Dr. Benson's patient charts to be subjected to peer review or the actual peer review process including Respondents Drs. Montgomery, Price, Acker, and Emmick. During this period, Dr. Benson submitted multiple requests to SJRHC and Respondents Kunz and Buche requesting that physicians then associated, or formerly associated, with the BVWC be excluded from his peer review to avoid conflicted peer review. Unfortunately, Respondents continued to play a role in the selection of charts to be reviewed and regularly participated in reviews and offered input to committees tasked with Dr. Benson's peer review. The inappropriate nature of this peer review was acknowledged by Respondent Montgomery in a 2001 memorandum and was confirmed by Respondent Kunz in deposition testimony, yet no action was ever taken by SJRHC to stop this inappropriate conduct, which violated the SJRHC Bylaws.

Dr. Benson's application for renewal of his privileges is granted and is then inexplicably delayed without notice.

On June 21, 2001, Dr. Benson filed an application to renew his SJRHC privileges. Each OB/Gyn physician with privileges at SJRHC was required to apply for renewal every two years. Dr. Benson's application was approved by Dr. William Price, the Chair of the OB/Gyn Department on September 19, 2001; then by Dr. Mark Riley, the Chair of the Credentials Committee, on September 20, 2001; and finally by Dr. Robert Emmick, the Chair of the Medical Executive Committee ("MEC"), on September 21, 2001. The application was then approved by Daniel Buche, the representative of the SJRHC Governance Council, on September 25, 2001.

Later that same day, after Respondent Buche provided final approval of Dr. Benson's application to renew his SJRHC privileges, and without informing Dr. Benson, the Credentials Committee recommended that all OB/Gyns, including Dr. Benson, with pending renewal applications be renewed for only six months. This delay was to last until receipt of the results from a review of the OB/Gyn department that was to be performed by a team from the American College of Obstetrics and Gynecology ("ACOG"). This action completely contradicted the approval for two years, without limitation, of Dr. Benson's application just a week prior. This recommendation to delay the renewal of privileges was approved by the MEC on October 14, 2001, but Dr. Benson was not notified of this action until December 4, 2001, after the ACOG review had been concluded at SJRHC in November 2001.

Without notice, Dr. Benson is subjected to a Focused Physician Review performed by ACOG at the request of SJRHC.

In early September 2001, SJRHC submitted a formal request to ACOG for a departmental review and a practitioner specific review known as a "Focused Physician" review of Dr. Benson. In November 2001, representatives from ACOG performed a review of the OB/Gyn Department at SJRHC and of Dr. Benson, individually, as the Focused Physician. ACOG never advised Dr. Benson that he was the subject of a "Focused Physician" review. The ACOG team interviewed numerous physicians and staff including Respondents Emmick, Acker, Price, and Montgomery as well as Thomas and Buche, all of whom offered comments and opinions on Dr. Benson that were never investigated or substantiated. Dr. Benson was never offered an opportunity to respond to these comments and was not told about them until long after his privileges were not renewed. Some of the comments in the Focused Physician review that were made about Dr. Benson went beyond his professional performance as an OB/Gyn.

Dr. Benson's privileges at SJRHC are not renewed by the Credentials Committee, the Medical Executive Committee, and the Governance Council of SJRHC as a result of the false conclusions in the ACOG report.

On January 29, 2002, the Credentials Committee at SJRHC received the ACOG report and appointed an Ad Hoc Committee to review the report and make recommendations regarding Dr. Benson. There was no provision in the Medical Staff Bylaws at SJRHC

authorizing the appointment of such a committee. On February 26, 2002, the Credentials Committee voted to approve the Ad Hoc Committee's recommendation that Dr. Benson's privileges not be renewed. Neither the Credentials Committee nor the Ad Hoc Committee performed an independent review of the ACOG Report, or of Dr. Benson's patient charts, and neither group informed Dr. Benson that he was under review, or that they voted not to renew his privileges.

On February 28, 2002, only two days after the Credentials Committee voted not to renew Dr. Benson's privileges; Dr. Price (Dr. Benson's Department Head) sent Dr. Benson portions of the ACOG report reflecting ACOG's review of Dr. Benson's patient charts. Dr. Price did not include the comments about him in the "Focused Physician" section of the ACOG Report, and did not tell Dr. Benson that the Credentials Committee had already voted, only two days earlier, not to renew his privileges.

On March 14, 2002, Dr. Benson met with the officers of the MEC to discuss generally the ACOG findings concerning his patient charts. At no time during this meeting was Dr. Benson provided with the "Focused Physician" section of the ACOG report, nor was Dr. Benson even apprised that such a document or that negative comments about him existed. Dr. Benson was afforded only a limited, brief opportunity to summarily present his reasoning behind the courses of treatment in the sixteen cases reviewed by ACOG and he was not told by the officers of the MEC that there was a pending recommendation not to renew his privileges. The Chair of the group left with Dr. Benson after the meeting, put his arm around Dr. Benson, and told him not to worry.

Five days later on March 19, 2002, without ever informing Dr. Benson that his privileges were at risk and without Dr. Benson being present, the MEC voted not to renew Dr. Benson's privileges following a 15-minute presentation to the group by Dr. Price. On March 21, 2002, Respondent Alan Smith, an administrator at SJRHC, sent Dr. Benson a letter stating that pursuant to Article VI, Part D, Section 7 of the Medical Staff Bylaws (which was the incorrect section of the Bylaws) the Credentials Committee and MEC recommended Dr. Benson's privileges not be renewed, and as a result, Dr. Benson could no longer practice or admit patients at SJRHC beginning March 25, 2002.

Dr. Benson files an administrative appeal and his privileges are finally restored after being banned from practice at SJRHC for three years.

Dr. Benson subsequently initiated an administrative appeal pursuant to the hospital's Medical Staff Bylaws. From July 9, 2002 to April 16, 2003, Dr. Benson presented his appeal of the MEC's decision to a three-doctor appellate panel. During the nine-month appellate process, the panel was presented with more than 100 hours of testimony in fourteen separate hearings. On May 30, 2003, the appellate panel recommended that Dr. Benson be granted a conditional reinstatement. On June 10, 2003, the MEC declined to accept the appellate panel's recommendation that Dr. Benson be reinstated. On November 15, 2004, the Governance Council of SJRHC voted to reappoint Dr. Benson to the Medical Staff. On April 6, 2005, the administrative process was finally completed, and Dr. Benson was permitted to once again admit patients at SJRHC after having been

wrongfully barred from practice at SJRHC for more than three years. Dr. Benson currently practices with full, unrestricted privileges at SJRHC.

C. Lower Court Proceedings.

On November 4, 2004, Dr. Benson filed suit in the District Court asserting causes of action under the Sherman Antitrust Act and state law causes of action for breach of contract, tortious interference with existing and prospective contractual relations, business disparagement, defamation, and intentional infliction of emotional distress. On or about August 25, 2006, the Respondents filed motions for summary judgment asserting qualified immunity defenses under the HCQIA and the TMPA, which potentially provides immunity to parties who participate in peer-review proceedings, provided the parties act in accordance with the statutory prerequisites.

The District Court issued a Memorandum and Order on March 22, 2007 (the "March Order") denying immunity under the HCQIA, but granting immunity under the TMPA. Additionally, the District Court dismissed Petitioners' state law claims with prejudice, granted Respondents' partial motions for summary judgment on the antitrust claims, and denied all other motions as moot. Pet. App. 35a-36a. However, Judge Keith Ellison, the trial judge, later wrote that the March Order was not the final order as it was not a final resolution on the merits. Pet. App. 21a-22a.

Respondents initially moved for summary judgment on their defenses of qualified immunity under the HCQIA and the TMPA. To qualify for immunity under the HCQIA, a peer reviewer must satisfy four elements

relating to the objective reasonableness of the peer reviewer's actions and the peer review process. Almost all peer review related cases end with the defendants receiving qualified immunity under the HCQIA. However, the District Court herein denied summary judgment on HCQIA immunity because there was a fact issue present as to whether Respondents offered Dr. Benson the adequate notice and due process required by the statute. Pet App. 44a-47a.

The District Court proceeded to analyze whether Respondents were entitled to qualified immunity under the TMPA. To qualify for immunity, the peer reviewers must show that they acted without malice and in the reasonable belief that their actions were warranted given the facts known at the time. Malice may be demonstrated by a showing that the defendants (1) had knowledge that an allegation was false or acted with reckless disregard for whether the allegation was false, or (2) had ulterior motives combined with an inadequate investigation. The District Court held in the March Order that there was no fact issue with respect to either of these showings. Pet. App. 47a-52a.

In doing so, the District Court incorrectly concluded that Petitioners failed to identify sufficient evidence of malice to defeat Respondents' immunity under the TMPA. The District Court held that the allegations in the ACOG report formed the basis of the MEC's decision to not renew Dr. Benson's privileges, and Petitioners' evidence did not suggest that "the allegations in the ACOG report were false, much less that Defendants knew they were false or acted with reckless disregard for their falsity." Pet. App. 47a-49a. The District Court erroneously concluded in the March

Order that "[b]ecause the ACOG team's *investigation* of SJRHC's OB/GYN Department was independent and thorough, Plaintiffs cannot raise a fact issue as to actual malice by way of inadequate investigation and *ulterior motives*" (emphasis added). Pet. App. 51a. The District Court overlooked the fact that the ACOG team leader testified that it was not ACOG's function to perform an *investigation*, and that an *investigation* of the allegations was never performed.

On April 5, 2007, Petitioners filed a Motion to Alter or Amend the judgment under Rule 59(e) based on the District Court's omission of vital evidence demonstrating a fact issue that Respondents acted with malice during Dr. Benson's peer review. In a Memorandum and Order entered on August 22, 2007 (the "August Order"), the order identified by the trial judge as the final order, the District Court held that there was not a fact issue regarding Respondents' knowledge of, or reckless disregard for, the falsity of the conclusions in the ACOG report, despite the District Court acknowledging its mistake in evaluating the expert testimony offered by Petitioners. Pet. App. 27a-29a.

However, the District Court's August Order substantially modified the March Order with respect to the second method for proving malice. The District Court held that Petitioners did adduce sufficient evidence to raise a fact issue that Respondents possessed ulterior motives. Pet. App. 30a. However, the District Court refused to recognize the presence of malice by holding that Petitioners did not produce sufficient evidence of an inadequate investigation to deny Respondents qualified immunity even after Petitioners pointed the District Court to ACOG's

admission that they do not *investigate* claims made against physicians. Pet. App. 30a-32a. At the same time, the District Court entered a second Order on August 22, 2007 denying Respondents' earlier motion for entry of a final judgment under Rule 54(b) and stating that a "resolution on the merits had *now* been reached" (emphasis added). Pet. App. 21a.

On September 6, 2007, Petitioners filed a motion under Rule 59(e) challenging multiple erroneous statements in the August Order regarding Petitioners' evidence and presenting legal argument as to the proper standard of proof required to establish malice under the TMPA, an issue which received substantive attention from the District Court for the *first time* in the August Order. Pet. App. 29a. Petitioner's timely filed their Notice of Appeal on September 21, 2007, within thirty days of entry of the Order denying Petitioners' first motion under Rule 59(e). The District Court entered a third Memorandum and Order on October 22, 2007 (the "October Order") denying Petitioners' motion. Pet. App. 18a. Petitioners' thereafter timely filed an Amended Notice of Appeal on November 8, 2007 to include the most recent opinion from the District Court.

During the briefing process below, the Fifth Circuit requested additional briefing on the Texas Supreme Court's position with respect to the proper standard of proof for proving malice in light of a recent Texas decision in *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 220-22 (Tex. 2005). Petitioners submitted a letter brief demonstrating that the Texas Supreme Court concluded that, absent statutory language to the contrary, Texas law applies a preponderance of the evidence standard of proof to the elements of a

plaintiff's cause of action in a civil action even where malice is a necessary element for recovery.

On July 10, 2009, the Fifth Circuit issued a decision affirming the District Court. Pet. App. 1a. The Fifth Circuit held that Petitioners' second Rule 59(e) motion was not timely and the legal error raised in the motion, the proper standard of proof, was not preserved for appellate review. Pet. App. 12a. The Fifth Circuit construed the question to be decided as whether "a litigant has sufficiently presented to a district court an issue that only appears in an improper, successive Rule 59(e) motion." Pet. App. 8a. The Fifth Circuit first analyzed the motion filed by Petitioners after the August Order as a motion filed under Rule 60(b) to correct an obvious error of law. Pet. App. 9a-11a. The Fifth Circuit concluded that the District Court's holding that clear and convincing is the proper standard of proof for malice under the TMPA was not an obvious error of law. Pet. App. 11a.

The Fifth Circuit proceeded to analyze whether this issue qualified as one that could be considered for the first time on appeal, but once again concluded that it did not constitute a plain error due to what the Fifth Circuit cited as unclear precedent. Pet. App. 11a-12a. The Fifth Circuit ended its analysis of the TMPA issue and failed to provide any additional insight as to its *de novo* consideration of whether Petitioners produced sufficient evidence to raise a genuine issue of material fact as to malice under the clear and convincing evidentiary standard. Pet. App. 12a-14a. It is not clear from the Fifth Circuit's opinion if such a *de novo* review was actually performed.

On July 23, 2009, Petitioners filed a Petition for Rehearing *En Banc* and/or Petition for Panel Rehearing requesting that the opinion be reconsidered based upon the Fifth Circuit's improper characterization of the Rule 59(e) motion filed after the August Order as an impermissible, successive motion. On August 27, 2009, the Fifth Circuit denied Petitioners' requests for rehearing. Pet. App. 64a-68a.

REASONS FOR GRANTING THE PETITION

I. The Petition should be granted because the Fifth Circuit refused to entertain a legal argument presented in a Rule 59(e) motion that was timely filed after the District Court entered a new or amended judgment in contravention to the principle announced by this Court in *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*

This Court, as well as other circuits including the Fifth Circuit, has long recognized the concept that a party may file a second motion under Rule 59(e) if the trial court issues an opinion or judgment that constitutes an amended or new judgment. Because a new or amended judgment interjects new issues, or substantively changes the court's original opinion, the second motion filed is the first Rule 59(e) motion to address the issues presented in the new or amended judgment. In its opinion, the Fifth Circuit failed to adhere to this directive, first adopted by this Court in *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), and therefore, this Petition should be granted to rectify the Fifth Circuit's error. Petitioners filed a second motion under Rule 59(e) in the underlying action, but this motion was

filed after the District Court issued its second order, the August Order, containing material and substantive changes that qualified it as a new or amended judgment.

A motion to alter or amend a judgment must be filed no later than ten days after the entry of the judgment. FED. R. CIV. P. 59(e). In *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), the Supreme Court held that the time period for filing a notice of appeal begins anew when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered. *Id.* at 249. Time periods begin anew when "the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.*

The Fifth Circuit has previously adopted the principle that an amended judgment resets the filing deadlines if it substantively changes the prior judgment. *See Harrell v. Dixon Bay Transportation*, 718 F.2d 123, 129 (5th Cir. 1983); *see also Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 85-86 (5th Cir. 1992); *Dixie Sand & Gravel Co., Inc. v. Tenn. Valley Auth.*, 631 F.2d 73 (5th Cir. 1980). In *Nobby Lobby, Inc.*, the Fifth Circuit stated that "[t]hus, the second motion, by presenting at least one completely different ground for relief from judgment, interrupted the time allowed for filing an appeal, and the city's appeal was timely. The fact that the city filed an earlier motion to reconsider on different grounds does not change this result." *Nobby Lobby*, 970 F.2d at 85. Other circuits also adhere to this principle. *See e.g. Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201,

206 (6th Cir. 1990); *Wright v. Preferred Research, Inc.*, 891 F.2d 886, 889 (11th Cir. 1990); *Charles v. Daley*, 799 F.2d 343, 347-48 (7th Cir. 1986).

In Charles v. Daley, the Seventh Circuit stated that "[t]he purpose of the rule [59(e)] suggests that when a court *alters* its judgment, a person aggrieved by the alteration may ask for correction. A successive motion directed to the same judgment is ineffectual, but when there is a new judgment an alteration independently sufficient to restart the time for appeal – there is also a new period in which to file a motion under Rule 59." *Charles*, 799 F.2d at 348.

In its second order, the August Order, the District Court revised Petitioners' legal rights and obligations by resolving genuine ambiguities with respect to the definition of malice and by changing matters of substance when it called into question the appropriate standard for proving malice; reversed a previous holding with respect to immunity; acknowledged errors in its March Order; and relied upon new facts to support its decision. Pet. App. 29a, 30a, 26a-32a. These facts resulted in the August Order constituting a new or amended judgment that restarted the ten-day deadline for filing a Rule 59(e) motion. Petitioners' motion to alter or amend filed on September 6, 2007 was timely, and properly presented the standard of proof issue to the District Court.

In the August Order, the District Court resolved a genuine ambiguity with respect to the definition of malice. In the March Order, the District Court defined actual malice as knowledge of the falsity of the allegations or reckless disregard for the falsity of the allegations. Pet. App. 47a. However, the District Court

stated that Petitioners failed to produce any evidence that the allegations against Dr. Benson were false and that Petitioners never argued that they were false. Pet. App. 49a. Petitioners challenged this erroneous statement in the Rule 59(e) motion filed on April 5, 2007. In the August Order, the District Court stated that "one paragraph of the Court's previous opinion may have over-emphasized the importance of actual truth or falsity of the underlying allegations." Pet. App. 27a. The District Court stated that it "is hopeful that this explanation alleviates any confusion caused by its previous Memorandum and Order." Pet. App. 27a. The District Court's effort to resolve an ambiguity in the March Order resulted in an August Order that presented new issues of law and fact that were ripe for challenge by a Rule 59(e) motion.

In the August Order, the District Court also changed matters of substance by acknowledging errors in the previous ruling and altering the grounds supporting its decision. In the March Order, the District Court granted Respondents' summary judgment motions declaring that Petitioners failed to produce evidence showing Respondents knew the allegations in the ACOG report were false, or acted with reckless disregard for their falsity. Pet. App. 49a. To support this conclusion, the District Court incorrectly stated that none of Petitioners' experts were OB/Gyns and none of Petitioners' experts opined that the allegations of inadequate documentation and patient management were false. Pet. App. 50a. In its August Order, the District Court acknowledged that it overlooked the credentials and opinions of Petitioners' experts and failed to consider Petitioners' primary expert evidence. Pet. App. 27a. No longer able to rely on Petitioners' failure to produce evidence of the falsity

of the allegations against Dr. Benson, the District Court proceeded to generate new grounds to support its decision. Pet. App. 27a-29a. The new material contained in the August Order disturbed Petitioners' legal rights, creating a new or amended judgment, subject to challenge under Rule 59(e) by introducing the requirement that Petitioners demonstrate that Respondents *knew* the allegations in the ACOG report were false. This legal analysis differed from that employed in the March Order and placed a greater burden on Petitioners with respect to the production of evidence needed to defeat summary judgment.

The District Court also changed matters of substance in the August Order by calling into question, for the first time, the proper standard of proof for proving malice under the TMPA. The District Court used the "clear and convincing" language in one instance in the March Order, but the case cited was inapposite having neither used the term clear and convincing, nor suggested clear and convincing as the appropriate standard. Pet. App. 47a. The August Order was the first instance where the District Court clearly adopted the clear and convincing standard as the proper evidentiary standard for proving malice. Pet. App. 25a-26a, 29a. The District Court stated that "the Court does not express an opinion as to whether this evidence would be sufficient to raise a question of fact were the applicable standard a mere preponderance, but it is not sufficient to raise a question of fact regarding actual malice where a clear and convincing standard applies." Pet. App. 29a. The District Court's August Order disturbed Petitioners' legal rights with the introduction of the standard of proof issue and the erroneous adoption of clear and convincing as the proper standard of proof. Petitioners

properly filed a motion to alter or amend within ten days of the August Order asserting that Texas law clearly established preponderance of the evidence as the proper standard.

The District Court further attempted to clarify this ambiguity by issuing its third order, the October Order, declaring that Petitioners were judicially estopped from challenging the standard of proof, a determination wholly rebuked by the Fifth Circuit. Pet. App. 19a, 7a-8a. Once again, the District Court for the second time entered a judgment that substantially affected Petitioners' legal rights as the District Court now barred Petitioners from arguing a legal position. The District Court's ten-page August Order, and the two-page October Order, were not simply denials of motions to alter or amend, but were independent judgments that disturbed or revised Petitioners' legal rights and obligations and resolved a genuine ambiguity in the March Order. The motions filed by Petitioners within ten days of the August Order and the October Order, respectively, were proper under Rule 59(e) and the issues presented therein were properly before the District Court and the Fifth Circuit Court of Appeals.

II. This Petition should be granted because it presents an important procedural question of first impression for the Court as to whether a party may present a legal argument in a successive Rule 59(e) motion where the motion was not proffered to extend the appellate deadlines and was filed prior to the filing of a timely notice of appeal.

This Petition should be granted to address an issue of first impression. The jurisprudence regarding the filing of successive motions under Rule 59(e) is consistent in the position that successive motions may not be used to extend the appellate deadlines. The cases on this point consistently involve a party seeking to utilize a successive motion under Rule 59(e) to extend the deadlines after a party's failure to timely file a notice of appeal. *See Acevedo-Villalobos v. Hernandez*, 22 F.3d 384 (1st Cir. 1994); *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201 (6th Cir. 1990); *Venable v. Haislip*, 721 F.2d 297 (10th Cir. 1983); *Needham v. White Labs., Inc.*, 639 F.2d 394 (7th Cir. 1981); *Wansor v. George Hantscho Co., Inc.*, 570 F.2d 1202 (5th Cir. 1978); *Ellis v. Richardson*, 471 F.2d 720 (5th Cir.1973). The arguments in these motions were not considered by the appellate courts because the courts determined that they did not possess jurisdiction over the appeals under the principle that successive Rule 59(e) motions cannot be used to extend the appellate deadlines.

This Petition presents the unique scenario where a successive motion under Rule 59(e) is not being proffered to extend the appellate deadlines because Petitioners timely filed their Notice of Appeal and Amended Notice of Appeal, but rather it was used as

a mechanism to present a legal argument to the District Court to identify an error in the August Order. The Rule 59(e) motion was presented to the District Court on September 6, 2007, prior to the deadline for filing a notice of appeal, and was ruled upon by the District Court. However, the Fifth Circuit refused to recognize the legal argument as being properly before the trial court, and thereafter the appellate court.

The purpose of Rule 59 is to afford the district court an opportunity to correct its own errors, sparing the parties and appellate courts from unnecessary appellate proceedings like this one. *See United States v. Dieter*, 429 U.S. 6, 8 (1976). Petitioners are not attempting to use Rule 59 to obtain additional time to file a notice of appeal, but rather to identify errors in the August Order that could have been resolved prior to appeal. It is uncontroverted that Petitioners timely filed their Notice of Appeal on September 21, 2007.[1] This fact distinguishes Petitioners' case from the cases following the premise that successive Rule 59(e) motions are improper and will not be considered. Petitioners requested that the Fifth Circuit consider the arguments presented in the second Rule 59(e) motion filed on September 6, 2007, not for the purpose of requesting an extension of the appellate deadlines, but rather as a timely-filed instrument used to present the District Court with a legal question in need of resolution.

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[1] The Fifth Circuit acknowledged that Petitioners were "wise" in the filing of their Notice of Appeal on September 21, 2007 distinguishing this case from those where parties attempted to use successive Rule 59(e) motions as a mechanism for extending the appellate deadlines.

The District Court's second order, the August Order, brought to the forefront the issue of the correct standard of proof to be applied when analyzing actual malice under the TMPA, an issue that had not been previously briefed before the District Court.[2] Pet. App. 29a. Petitioners filed their motion on September 6, 2007, within ten days of the August Order. The motion presented legal grounds why the correct evidentiary standard for demonstrating malice is preponderance of the evidence. Additionally, Petitioners' motion was filed *prior* to (by fourteen days) the filing of its Notice of Appeal on September 21, 2007, and was therefore, before the District Court when this case was appealed, a fact that distinguishes Petitioners' case from those that have refused to consider successive Rule 59(e) motions. Pet. App. 6a. Petitioners' motion filed on September 6, 2007 did not re-urge the same arguments presented in their motion filed on April 5, 2007. Petitioners' second motion presented new challenges to the errors of fact and law present in the August Order, including the newly raised legal issue concerning the correct standard of proof.

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[2] Respondents attempted to argue that Petitioners were judicially estopped from challenging the correct standard of proof because Petitioners represented to the District Court that clear and convincing was the proper evidentiary standard. However, the Fifth Circuit rejected this argument stating that Petitioners "never formally conceded the standard utilized by the district court," and therefore Petitioners were not barred from challenging this issue based upon estoppel. Pet. App. 7a-8a.

III. This Petition should be granted because the Fifth Circuit erred in refusing to consider the legal arguments presented in Petitioners' Rule 59(e) motion because the motion was timely filed within ten days of the final judgment.

This Petition should be granted to correct the Fifth Circuit's error in failing to consider arguments raised in a motion filed pursuant to Rule 59(e) after entry of the initial final judgment in the underlying action.

Only a final judgment may be appealed as appellate deadlines are calculated based upon the date that the final judgment is entered. FED. R. APP. P. 4(a)(1); *In re Grand Jury Proceedings*, 43 F.3d 966, 969 (5th Cir. 1994); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 528 (5th Cir. 1996). A judgment is final when it conclusively determines the rights of the parties, leaving nothing for the court to do but execute the judgment. When there are multiple claims or parties, a court may enter a final and appealable judgment for fewer than all of the claims or parties if it determines there is no just reason for delay. FED. R. CIV. P. 54(b).

The District Court's March Order granted Respondents' motions for summary judgment, but did not constitute a final judgment because it did not dispose of all claims and causes of action. Respondents' counterclaim for litigation expenses remained before the District Court without resolution. On April 5, 2007, Respondents filed a Motion for Entry of Final Judgment seeking the entry of a final judgment on the grounds that the remaining counterclaim should not

delay the appeal of the summary judgment determination. Pet. App. 21a-22a.

On April 5, 2007, Petitioners filed a motion entitled Motion to Alter or Amend Judgment, which sought reconsideration of the March Order. Although titled a Motion to Alter or Amend Judgment, this pleading is more accurately characterized as a motion for reconsideration. *See Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (*en banc*) ("...it is important to make clear that the fact that GE labeled its motion as a Rule 59(e) motion to alter or amend is immaterial; a motion's substance, and not its form, controls."); *See Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 26 (1st Cir. 1988) ("'nomenclature should not be exalted over substance'") (quoting *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir.1982)).

The District Court subsequently issued its second Order, the August Order, setting forth the basis for its summary judgment ruling. Pet. App. 23a. On the same day that the August Order was issued, the District Court issued an Order on Respondent's Motion for Entry of a Final Judgment wherein the court stated that "a *final resolution on the merits* has ***now*** been reached in this case..." (emphasis added). Pet. App. 21a. In this ruling, the District Court explained that it would resolve the fees and expenses issue separately making the August Order a final, appealable judgment. Pet. App. 21a-22a.

The final, appealable judgment in this case was entered on August 22, 2007 as evidenced by the District Court's admission that a "final resolution on the merits has **now** been reached in this case" in

ruling on Respondents' request for entry of a final judgment and Pet. App. 21a. Because the appellate timelines are measured from the entry of a final judgment, the motion to alter or amend filed by Petitioners on September 6, 2007 was Petitioners' first motion under Rule 59(e). All issues and arguments raised in this motion, including the standard of proof issue, were properly before the District Court and the Fifth Circuit on appeal.

IV. This Petition should be granted because the Fifth Circuit erred in failing to recognize the plain error committed by the District Court and thus has created confusion and uncertainty regarding the standard of proof to be used in proving malice under the TMPA.

This Petition should be granted to correct the Fifth Circuit's error in failing to hold that the District Court committed a plain error as that term has been defined by this Court in *United States v. Olano*. The Fifth Circuit's decision is inconsistent with the present understanding of plain error and should be reversed. Further, the Fifth Circuit's decision refusing to address the standard of proof issue on the merits has resulted in a *de facto* adoption of the wrong standard of proof, clear and convincing, as the standard of proof for demonstrating malice under the TMPA. The Fifth Circuit's opinion now stands in contradiction to the Texas Supreme Court's position with respect to this issue, which is a matter of state law that should be controlled by the state's highest court. *See Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009).

While the general rule that arguments not raised before the district court are waived, an appellate court may correct an error not raised at trial where there is an (1) error, (2) that is plain, and (3) and that affects substantial rights. *United States v. Olano*, 507 U.S. 725, 733-34 (1993); *McCann v. Tex. City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir. 1993); *see Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 685 (5th Cir. 1998). The appellate court may exercise its discretion to correct plain errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Holmes*, 145 F.3d at 685. The plain error exception is designed to prevent a miscarriage of justice where the error is clear under current law. *Septimus v. Univ. of Houston,* 399 F.3d 601, 606-07 (5th Cir. 2005). "Plain" is synonymous with clear or, equivalently, obvious. *Olano*, 507 U.S. at 733. The "substantial rights" prong is generally satisfied where "in most cases ... the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States v. Ruiz-Arriaga*, 565 F.3d 280, 282 (5th Cir. 2009) (quoting *Olano*, 507 U.S. at 734).

The District Court committed a plain error that substantially affected Petitioners' rights by requiring clear and convincing evidence of actual malice to defeat Respondents' claim of immunity under the TMPA. In support of its application of the clear and convincing standard, the District Court cited *Monroe v. AMI Hosp. of Tex., Inc.*, 877 F.Supp. 1022, 1030-31 (S.D. Tex. 1994), a case that did not pronounce clear and convincing as the appropriate standard, or even suggest clear and convincing as the appropriate standard. Pet. App. 25a, 47a. To pronounce a standard of proof that deviates from the traditional preponderance of the evidence standard without

citation to a valid legal precedent constitutes plain error.

The Fifth Circuit pointed to an unpublished federal district court opinion ostensibly requiring clear and convincing evidence to establish malice under the TMPA as evidence that the error was not plain or obvious. Pet. App. 11a. However, this opinion was issued in 2004—well *before* the Texas Supreme Court issued a decision declaring preponderance of the evidence as the standard of proof required for a plaintiff that must prove malice as an element of its cause of action. *See Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 220-22 (Tex. 2005). The District Court was required to determine how the Texas Supreme Court would interpret state law, but instead, cited to an unpublished opinion from a federal district court, which was rendered *before* the Texas Supreme Court issued its decision establishing preponderance of the evidence as the standard of proof for a plaintiff proving malice as an element of its cause of action. *See Beavers*, 566 F.3d at 439.

In *Romero*, the Texas Supreme Court held that "we know of no requirement that malice be proved by more than a preponderance of the evidence..." *Id.* at 220. Inexplicably, the Fifth Circuit referred to this statement by the Texas Supreme Court as *dicta*. The Fifth Circuit's declaration, in contrast to the long standing principle in Texas jurisprudence that preponderance of the evidence is the proper standard of proof in civil actions unless the legislature expressly dictates otherwise, is erroneous. *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 792-93 (Tex. 1994) ("Only in extraordinary circumstances, such as when we have been mandated to impose a more onerous

burden, has this Court abandoned the well established preponderance of the evidence standard.").

When the District Court issued its orders, the position of the Texas Supreme Court on the issue of proving malice by a plaintiff seeking the award of actual damages was settled. The Fifth Circuit cited *Jenkins v. Methodist Hosps. of Dallas, Inc.*, No. 3:02-cv-1823-M, 2004 WL 3393380 (N.D. Tex. Aug. 14, 2004) (unpublished) to attempt to demonstrate that the standard of proof issue in Texas is unsettled, but this case was prior in time and inconsistent with *Romero,* and thus, cannot serve as support for the proposition that this area of the law was unsettled. Pet. App. 11a. The Fifth Circuit and the District Court's failure to follow the directive in *Romero* and to recognize the absence of any legislative instruction authorizing the application of the heightened clear and convincing standard, constituted plain error that substantially affected Petitioners' rights.

CONCLUSION

In accordance with the foregoing, Petitioners request that the Court grant its Petition for Writ of Certiorari because this case presents important issues of law that require instruction from this Court and grant such other and further relief to which Petitioners may show themselves to be justly entitled.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20726

[Filed July 10, 2009]

ROYAL BENSON, MD; BENSON OB/GYN CENTER, PA

Plaintiffs - Appellants

v.

ST JOSEPH REGIONAL HEALTH CENTER; ST JOSEPH HEALTH SYSTEM; FRANCISCAN SERVICES CORPORATION; SISTERS OF ST FRANCIS OF SYLVANIA, OHIO; BETTY G ACKER, MD; DANIEL BUCHE; DR THOMAS W DAVIS, JR; DR DANIEL B DAWSON; DR DAVID R DOSS; DR ROBERT H EMMICK, JR; GRETCHEN KUNZ; DR G MARK MONTGOMERY; RN MYESHA NICHOLS-TURNER; DR WILLIAM F PRICE; ALAN C SMITH; KATHLEEN A THOMAS

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before KING, STEWART, and SOUTHWICK, Circuit Judges.

Leslie H. Southwick, Circuit Judge:

Dr. Royal Benson, a doctor specializing in obstetrics and gynecology, had his medical privileges terminated at the defendant hospital. He alleges that this occurred as a result of a malicious and unreasonable peer review. Benson sued the hospital and numerous individuals involved in the peer-review process. The district court granted summary judgment to all Defendants. For the reasons that follow, we affirm the judgment of the district court.

I. BACKGROUND

Benson joined the Brazos Valley Women's Center as an associate OB/GYN in 1992. Around the same time, he also obtained privileges to practice at St. Joseph Regional Health Center, a hospital between Bryan and College Station, Texas. The hospital grants clinical privileges on a two-year basis. Application for renewal of those privileges is required at the end of each term.

Appellees Betty Acker, David Doss, and Mark Montgomery practiced with Benson at the Center and also held privileges at St. Joseph. Benson contends that he worked at the Center until 1997, when he was

voted out because of "personal animosity" held by the other doctors against him and because of his "desire to change the group's distribution of net profits." He opened his own practice after the separation and continued working at St. Joseph.

Benson's two-year contract at St. Joseph was up for renewal in September 2001. The month before his privileges were to expire, however, St. Joseph's Credentials Committee recommended that all OB/GYNs set for September reappointment receive a six-month extension while a team from the American College of Obstetricians and Gynecologists ("ACOG") conducted a review of the OB/GYN department. Benson was informed by letter that he had been approved for the six-month extension, pending the ACOG review.

The ACOG crew reviewed the OB/GYN department's quality of care over a four-day period in November 2001 and reported its findings in January 2002. St. Joseph's Credentials Committee then created an ad hoc committee to review the ACOG report and make recommendations. Based on the ACOG report, the ad hoc committee provided the Credentials Committee with a recommendation not to renew Benson's privileges. Thereafter, the Credentials Committee provided that same recommendation to the Medical Executive Committee.

Prior to acting on the recommendation, the Executive Committee gave Benson an opportunity to address the criticisms contained in the ACOG report. He was unable to satisfy the Executive Committee, though, and a non-renewal recommendation was forwarded to the St. Joseph's Governance Council.

Benson's hospital privileges expired on March 25, 2002.

Benson subsequently took advantage of his right to request a hearing on the Executive Committee's recommendation. Fourteen sessions were held between July 2002 and April 2003. At the end of the sessions, the Executive Committee again voted to recommend that Benson's privileges be revoked. Benson sought appellate review before St. Joseph's Governance Council.

In November 2004, while his internal review was pending, Benson filed suit in the U.S. District Court for the Southern District of Texas. Defendants were St. Joseph and several hospital employees who had participated in his peer review.[1] He alleged that the peer-review process was tainted by the participation of several doctors who previously worked with him at the Center, including Acker, Doss, and Montgomery. Benson sought damages in the form of lost profits for the time he was unable to practice at St. Joseph.

The Defendants answered, then later moved for summary judgment. The district court granted summary judgment with respect to the state claims on qualified immunity grounds and granted summary judgment with respect to a federal antitrust claim for a reason other than qualified immunity. The court denied all other motions as moot. Benson moved twice,

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[1] Eventually, on November 15, 2004, the Governance Council voted to reappoint Benson for one year, subject to a set of conditions. His new grant of privileges took effect on April 6, 2005, more than three years after St. Joseph originally decided not to renew his employment.

unsuccessfully, to alter or amend the judgment. This appeal followed.

II. DISCUSSION

A. State Statutory Claims

The Texas Medical Practice Act ("TMPA") affords immunity from civil liability to peer-review participants when they act "without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to that person." Tex. Occup. Code § 160.010(a)(2). The district court, on March 22, 2007, granted summary judgment against Benson on his state law claims after determining that the Defendants were entitled to the TMPA's immunity. In so holding, the district court explained that peer-review participants are always presumed to have acted without malice. It also found that, to overcome the presumption, a plaintiff bears the burden of proving the contrary by clear and convincing evidence.

Whether the district court was correct to employ the clear and convincing evidentiary standard is the question on the merits. Before we can review that point, however, it is necessary to evaluate whether the argument was properly preserved for our review. *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009) (If a trial court error is not preserved, authority to correct the error on appeal "is strictly circumscribed.").

Following the summary judgment order, Benson filed a Motion to Alter or Amend Judgment on April 5, 2007, within the required ten-day period. *See* Fed. R. Civ. P. 59(e). In the motion, Benson did not argue that the district court's use of the clear and convincing

standard was error. Instead, he maintained that the district court erred because substantial evidence was produced "that would permit a reasonable jury to conclude that Defendants acted with actual malice, and thus are not entitled to immunity under the TMPA." The district court denied the motion on August 22, 2007.

After the denial, Benson filed what he referred to as a Second Motion to Alter or Amend Judgment on September 6, 2007. Benson now did contest the district court's use of the clear and convincing standard, asserting that a preponderance of the evidence standard applied. The Defendants responded by arguing, first, that Benson's Rule 59(e) motion was successive, and in the alternative, that he was judicially estopped from making the argument.

Before the district court ruled on the motion, Benson filed a notice of appeal seeking review of the district court's summary judgment order and the denial of his first motion to alter or amend. The date of the notice of appeal was September 21, 2007.

On October 22, 2007, the district court evaluated Benson's September 6, 2007 motion. It did not address the untimeliness or successive nature of Benson's second Rule 59(e) motion. Rather, it denied Benson's motion on the ground that he was judicially estopped from arguing that an inappropriate evidentiary standard had been employed.

Following the district court's ruling, Benson filed an amended notice of appeal. This amendment was filed on November 8, 2007. It sought review of the district court's grant of summary judgment and of the

denials of both motions to alter or amend the judgment.

We start with analyzing the effect of the filing of two motions under Rule 59(e). Only the first one tolled the thirty-day period for filing a notice of appeal. *See Charles L.M. v. Ne. Indep. Sch. Dist.*, 884 F.2d 869, 870 (5th Cir. 1989). Benson filed a notice of appeal on September 21, 2007, without waiting for a ruling on his second Rule 59(e) motion. That was wise, as it satisfied the requirement to file within thirty days of the district court's August 22 ruling denying the first Rule 59(e) motion. That notice of appeal brought to us all matters identified in the motion that had been properly presented to the district court prior to that time.

Unfortunately, Benson's principal argument on appeal – that the wrong evidentiary standard was applied – had not yet been presented to the district court by the time of the notice of appeal. On appeal, the Defendants raise that objection to consideration of the issue. They begin their response to the issue of the evidentiary standard by pointing out that the "only time [Benson] ever suggested the standard of proof under the TMPA should be something other than 'clear and convincing' was *after* their First Motion to Alter or Amend was denied." In making this argument, the Defendants did not refer to waiver or a failure to preserve. Instead, they argued that Benson's argument in his Rule 59(e) motion that he had satisfied the clear and convincing standard was a "judicial admission" that conceded the issue. *See Martinez v. Bally's La. Inc.*, 244 F.3d 474, 476 (5th Cir. 2001). It is not that, as Benson never formally conceded the standard utilized by the district court. Nonetheless, the Defendants have

argued that Benson improperly waited to present his argument on the alleged error in the evidentiary standard until the second Rule 59(e) motion. We find the issue of the impropriety of the motion to be raised adequately.

The federal rules do not provide for a motion requesting a reconsideration of a denial of a reconsideration. *Charles L.M.*, 884 F.2d at 870. Were such motions permitted, it is conceivable that a dissatisfied litigant could continually seek reconsideration and prevent finality to the judgment. Benson's first Rule 59(e) motion was timely, was considered and denied, and exhausted Benson's right to reconsideration. Our question, though, is tangential from the ones that we find to be answered by the precedents. We need to decide if a litigant has sufficiently presented to a district court an issue that only appears in an improper, successive Rule 59(e) motion.

A beginning to our needed answer is found in the fact that certain procedural flaws in Rule 59(e) motions are not fatal. This court has recognized that we "'may treat an untimely 59(e) motion to alter or amend the judgment as if it were a Rule 60(b) motion if the grounds asserted in support of the Rule 59(e) motion would also support Rule 60(b) relief.'" *Halicki v. La. Casino Cruises, Inc.*, 151 F.3d 465, 470 (5th Cir. 1998) (quoting 12 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.03[4], at 60-24 (3d ed. 1998)). We see no reason an improperly successive Rule 59(e) motion could not similarly be transformed into a Rule 60(b) motion. At least for purposes of our analysis today, we make that assumption.

Under Rule 60(b)(1), the court may grant relief from a final judgment or order on the grounds of "mistake, inadvertence, surprise, or excusable neglect," with "mistake" being the only possibly relevant ground here. The "mistake," though, was an alleged substantive legal error on the part of the district court. We now look to whether a legal error can be raised in a Rule 60(b) motion.

"The circuits are split concerning whether courts may reconsider, pursuant to Rule 60(b)(1), legal errors they may have made in a judgment." MOORE, *supra*, § 60.41[4][a], at 60-109. Our rule is that a Rule 60(b) motion may be used "to rectify an obvious error of law, apparent on the record." *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987). If such is the purpose of the motion, the Rule 60(b) motion ordinarily must be filed within the time for taking an appeal.[2] *Id.* Our stated rationale has been that "a Rule 60(b)(1) motion filed within the time for appeal saves the parties and the court time and expense of a needless appeal." *Id.* Our focus on "obvious" legal error, which this court as a matter of course would correct anyway, is to prevent a Rule 60(b) motion from being used as a substitute for a timely appeal on disputed issues. *Id.*

Benson did file his successive motion within the time for taking an appeal. The district court denied the

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[2] We note that, on rare occasions, we have permitted a Rule 60(b) motion based on a legal error to be filed after the time for filing a notice of appeal has expired. *See, e.g., Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930-31 (5th Cir. 1976) (permitting the filing of a Rule 60(b) motion on the basis of a legal error after the time for filing a notice of appeal had expired because of a change in the law).

first Rule 59(e) motion on August 22, 2007. From that point, Benson had thirty days to file a notice of appeal. The successive motion was filed on September 6, 2007, well within the thirty-day time frame.

Though the motion was proper as to time, we find that it was not proper as to subject. The alleged legal error is not one appropriately characterized as an "obvious error of law." *See id.* While we may doubt whether the district court employed the appropriate evidentiary standard,[3] all parties concede that Texas state courts have never expressly stated what standard should be used to prove malice in this context. Therefore, were we to reach the merits of Benson's claim, we would be required to determine how the Texas Supreme Court would interpret state law. *See Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009). This is not the sort of legal error we have allowed to be brought in a Rule 60(b) motion. *See Alvestad v. Monsanto*, 671 F.2d 908, 913 (5th Cir. 1982) (recognizing that our prior Rule 60(b) cases involving alleged legal errors have attempted "merely to avoid wasting appellate resources on the perfunctory correction of 'obvious errors of law'"). The answer would not be free from doubt. Consequently, any error is not so obvious as to permit the impropriety of the motion to be overlooked.

We find that Benson's arguments are not entitled to be treated as an exception to the usual requirement

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[3] In evaluating an unrelated TMPA provision, the Texas Supreme Court has commented, in dicta, that "we know of no requirement that malice be proved by more than a preponderance of the evidence . . . to recover actual damages." *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 220 (Tex. 2005).

that an issue must first be presented to the district court before it may be raised on appeal. *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009). The alleged legal error in the district court's ruling could have been argued in the first, properly filed motion to alter or amend the judgment. The initial Rule 59(e) mechanism is a "readily available procedure[] by which a party may seek reconsideration by a court of a number of matters, including legal errors made by the court." MOORE, *supra*, § 60.41[4][a], at 60-109. Benson failed to utilize it.

It is true, though, that we may consider arguments concerning pure questions of law that were not presented to the district court. *Veigel*, 564 F.3d at 700. A plain-error standard of review is applied to determine if the procedural default can be overridden. *Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 685 (5th Cir. 1998). The plain-error test requires that there be (1) an error; (2) that it be plain; (3) and that substantial rights be affected. *Id.*

The problem for Benson is, again, that any legal error as to the evidentiary standard was not plain. If the TMPA requires only that malice be proved by a preponderance of the evidence, then the district court's utilization of the clear and convincing standard was error. But that error may not be characterized as plain because, as we stated, the parties concede that Texas state courts have never made the standard clear. Indeed, at least one federal court applying Texas law has found that clear and convincing evidence is needed to rebut the presumption against malice. *Jenkins v. Methodist Hosps. of Dallas, Inc.*, No. 3:02-cv-1823-M, 2004 WL 3393380 (N.D. Tex. Aug. 14, 2004) (unpublished).

Because Benson first raised the alleged legal error presented to this court in an improper second Rule 59(e) motion, it was not preserved for our review. The district court's grant of qualified immunity to the Defendants under the TMPA must therefore stand.

B. Federal Antitrust Claim

Our review of a summary judgment is *de novo*. *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 2000). "We view all facts in the light most favorable to the non-movant, and affirm only when the evidence 'show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 270 (5th Cir. 2008) (quoting Fed. R. Civ. P. 56(c)).

Section 1 of the Sherman Antitrust Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To prove a claim, plaintiffs must demonstrate that "(1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market." *Golden Bridge Tech., Inc.*, 547 F.3d at 271. When there is no allegation that the alleged conspiracy is *per se* unreasonable, the plaintiff is required to demonstrate that the alleged conduct unreasonably restrains trade in light of actual market forces under the rule of reason. *Id.*

This rule of reason requires that a fact-finder consider "'all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as

imposing an unreasonable restraint on competition.'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)). A violation requires proof that the practice "actually had an adverse effect on competition." *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 412 (5th Cir. 2007). The court must balance the anticompetitive effects of the restrictive practice against any benefits or justifications within the relevant product and geographic markets. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997).

We apply these principles to Benson's claims. He maintains that the district court erred in determining that St. Joseph's refusal to renew his privileges did not adversely affect OB/GYN services in Brazos County. He points specifically to two anticompetitive effects: (1) reduction in consumer choice of providers and (2) reduction in consumer choice of services.

With respect to providers, Benson notes that there is only one other hospital besides St. Joseph that provides obstetrics and gynecology services in Brazos County. Further, the four major insurance plans available to consumers only include St. Joseph in their coverage area. His ultimate point is that patients "desiring to receive treatment from Dr. Benson were forced to use other facilities in the county, which required prohibitive out of pocket costs."

With respect to services, Benson asserts that he "offered unique services and procedures that no other OB/GYN could have provided" in Brazos County. He also maintains that no other doctor performed certain

specialized services that he identifies. "Patients seeking these specialized services were forced to go elsewhere while Dr. Benson was not privileged at [St. Joseph]."

We agree with the district court that Benson has not raised a genuine issue of material fact on this issue. Benson's privileges were not renewed at St. Joseph for a period of more than three years. Still, he was free to provide services at his own clinic in Brazos County. The inability to service patients at the hospital of his choice does not demonstrate an unreasonable adverse impact on OB/GYN services for the entire county. *See Doctor's Hosp. of Jefferson, Inc.*, 123 F.3d at 309; *see also BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area*, 36 F.3d 664, 667-68 (7th Cir. 1994) (collecting rule of reason cases and noting that "[t]hose hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act"). Hence, Benson's antitrust claim fails as a matter of law.

C. Leave to Amend

Benson also challenges the district court's denial of his motion to amend his pleadings, in which he attempted to add a breach of contract claim that he contends falls outside the ambit of the Defendants' qualified immunity. Our review of the district court's denial of leave to amend a complaint is for abuse of discretion. *Cent. Laborer's Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546, 551 (5th Cir. 2007).

A post-judgment amendment is permissible only when the judgment is vacated pursuant to Federal

Rule of Civil Procedure 59 or 60. *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000). "While Fed. R. Civ. P. 15(a) endows a district court with 'virtually unlimited discretion' to allow amendments before entry of judgment, that discretion narrows considerably after entry of judgment." *Id.* Once the entry of judgment has occurred, it is proper to deny leave to amend "where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling." *Briddle v. Scott*, 63 F.3d 364, 380 (5th Cir. 1995).

Benson did not request leave to amend his pleadings until after the district court entered judgment and until after the district court denied his first motion to reconsider the judgment. While he claims that the delay in presenting his new claim was caused by the Defendants' "concealment of the document that evidenced the breach of contract," the document in question was in his possession in September 2005, approximately nineteen months before he sought leave to amend on April 5, 2007. In light of Benson's delay, the district court did not abuse its discretion when it denied leave to amend.

III. CONCLUSION

For the foregoing reasons, the district court's decision is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20726
D.C. Docket No. 4:04-CV-4323

[Filed July 10, 2009]

ROYAL BENSON, MD; BENSON OB/GYN CENTER, PA	)
	)
Plaintiffs - Appellants	)
	)
v.	)
	)
ST JOSEPH REGIONAL HEALTH CENTER; ST JOSEPH HEALTH SYSTEM; FRANCISCAN SERVICES CORPORATION; SISTERS OF ST FRANCIS OF SYLVANIA, OHIO; BETTY G ACKER, MD; DANIEL BUCHE; DR THOMAS W DAVIS, JR; DR DANIEL B DAWSON; DR DAVID R DOSS; DR ROBERT H EMMICK, JR; GRETCHEN KUNZ; DR G MARK MONTGOMERY; RN MYESHA NICHOLS-TURNER; DR WILLIAM F PRICE; ALAN C SMITH; KATHLEEN A THOMAS	)
	)
Defendants - Appellees	)

Appeal from the United States District Court for the Southern District of Texas, Houston

Before KING, STEWART, and SOUTHWICK, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/_____
Deputy 9/4/09

New Orleans, Louisiana

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-04-4323

[Filed October 22, 2007]

ROYAL BENSON, M.D. and BENSON OB/GYN CENTER, P.A.	)
Plaintiffs,	)
v.	)
ST. JOSEPH REGIONAL HEALTH CENTER, et al	)
Defendants.	)

MEMORANDUM AND ORDER

Plaintiffs have filed a Second Motion to Alter or Amend Judgment (Docket # 385) and a Request for Hearing (Docket #386). Most of the arguments advanced have already been considered by the Court, and earlier memoranda and orders need not be restated. On some issues, however, Plaintiffs have offered familiar arguments in a slightly different guise, and, in one instance, they have offered an argument

that completely contradicts their long-held position before this Court. These arguments will be considered individually.

1. The Applicable Evidentiary Standard Under the Texas Medical Practice Act

Plaintiffs claim that the Court erred in applying a "clear and convincing" standard to the determination of malice under the Texas Medical Practice Act ("TMPA"). The Court is concerned with Plaintiffs' argument because, as Defendants amply demonstrate, it is a total controversion of Plaintiffs' consistent representations to this Court. *See* Defs.' Resp. to Pls.' Mot. Alter or Am. J. (Docket #391) at 4-6. It was in large part because the Court recognized that Plaintiffs faced a daunting evidentiary hurdle that it afforded Plaintiffs the extensive discovery that was so very burdensome to Defendants. Plaintiffs are judicially estopped from now arguing that use of the clear and convincing standard was error. *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001).

2. The Rescoring of Certain Charts

Plaintiffs also contend that this Court erred in its analysis of the rescoring of various charts reviewed by the American College of Obstetrics and Gynecology ("ACOG"). Although it is true, as the Court noted, that 84% of the charts were not rescored, Plaintiffs assert that the salient fact is that none of Dr. Benson's charts were rescored while eighteen out of thirty charts belonging to other doctors were rescored (i.e., 60% of charts of other doctors were rescored). Even if the Court were to apply the same percentile to Dr. Benson's charts and conclude that only 40% were

correctly scored as "unsatisfactory," this would still have been an adequate basis for Defendants to have taken the action that they did.

3. The Statute of Limitations for Breach of Contract

Plaintiffs also complain that they should have been allowed to amend their pleadings, after summary judgment had been rendered, to allege a breach of contract claim that accrued in October 2001. Even if Plaintiffs were to prevail on the statute of limitations issue, however, the Court, as previously indicated, would disallow the proposed amendment as untimely and unduly prejudicial to Defendants.

For the reasons stated above, Plaintiffs' Second Motion to Alter or Amend Judgment (Docket #385) is hereby **DENIED**. Plaintiffs' Request for Hearing (Docket #386) is therefore also **DENIED**. Finally, Defendants have filed a Motion for Defense Costs (Docket #383). That motion is **DEFERRED** until the appeal still pending in this case has been concluded.

IT IS SO ORDERED.

SIGNED this 22nd day of October, 2007.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-4323

[Filed August 22, 2007]

ROYAL BENSON, M.D. and BENSON OB/GYN CENTER, P.A.,	)
Plaintiffs,	)
v.	)
ST. JOSEPH REGIONAL HEALTH CENTER, et al.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Rule 54(b) Motion for Entry of Final Judgment (Doc. No. 355). It is this Court's general practice to delay consideration of any attorneys' fees issues until a resolution on the merits has been reached. Then, the fees issues are resolved prior to entry of a final judgment. Thus, because a final resolution on the merits has now been reached in this case, the Court will permit Defendants

to make a separate motion for attorney's fees on or before **Wednesday, September, 5, 2007**, if they so desire. Final judgment will not be entered until all fees issues are decided.

Thus, Defendant's Rule 54(b) Motion for Entry of Final Judgment is **DENIED**.

IT IS SO ORDERED.

SIGNED this 22nd day of August, 2007.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-4323

[Filed August 22, 2007]

ROYAL BENSON, M.D. and BENSON OB/GYN CENTER, P.A.,	)
Plaintiffs,	)
v.	)
ST. JOSEPH REGIONAL HEALTH CENTER, et al.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court is Plaintiffs' Motion to Alter or Amend Judgment and Motion to Amend Pleading (Doc. No. 356). For the reasons set forth below, Plaintiffs' motion is **DENIED**.

I. BACKGROUND

For the sake of brevity, the Court hereby incorporates the "Background" section contained in its Memorandum and Order of March 22, 2007, with two modifications. First, the Court previously stated that the OB/GYN Department created the Ad Hoc Committee, when in fact the Credentials Committee created the Ad Hoc Committee. Second, the Court may have implied that all members of the Hospital's Medical Executive Committee ("MEC") were present at a discussion with Dr. Benson that took place on March 14, 2002, when in fact only the officers of the MEC were present (Drs. Ryan, Emmick, Sterling, and Patton).

Plaintiffs take issue with a number of facts omitted from the Court's recitation of background information in its March 22, 2007, Memorandum and Order. The Court acknowledges that it did not include every fact proffered by every party in the "Background" section of its Order, but the relevant facts were included and the irrelevant facts were not. No further modifications will be made.

II. RULE 59(e) STANDARD

Plaintiffs seek relief under Federal Rule of Civil Procedure 59(e), petitioning the Court to alter or amend its previous judgment. In the Fifth Circuit, to prevail under Rule 59(e), a party must establish (1) an intervening change in controlling law, (2) the availability of new evidence that was not previously available, or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *In re Benjamin Moore*, 318 F.3d 626, 629 (5th Cir. 2002). *See also*

Waltman v. Int'l Paper Co., 875 F.2d 468, 473 (5th Cir. 1989). Plaintiffs do not contend that there has been an intervening change in the law or that new evidence has become available, but rather that there were clear errors of fact that must be corrected. Specifically, Plaintiffs claim that the Court made clear errors of fact in ruling that Defendants are entitled to immunity under the Texas Medical Practices Act ("TMPA") and that Plaintiffs' antitrust claims do not survive summary judgment. These arguments will be addressed in turn.

III. TMPA IMMUNITY

The TMPA affords immunity from civil liability for state law claims to peer review participants who "act[] without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to the person." *Tex. Occ. Code* § 160.010(a)(2) (Vernon 2004). There is a statutory presumption that participants acted without malice, *Maewal v. Adventist Health Sys.*, 868 S.W.2d 886, 893 (Tex. App.—Fort Worth 1993, writ denied), so a plaintiff bears the burden of overcoming that presumption by clear and convincing evidence, *Monroe v. AMI Hosp. of Tex., Inc.*, 877 F. Supp. 1022, 1030-31 (S.D. Tex. 1994). Malice, for purposes of the TMPA, is defined as "knowledge that an allegation is false or [] reckless disregard for whether the allegation is false." *Johnson v. Hosp. Corp. of Amer.*, 95 F.3d 383, 395 (5th Cir. 1996) (citing *Maewal*, 868 S.W.2d at 893). Thus, the Fifth Circuit has explained that, in order to overcome the TMPA immunity presumption, a plaintiff must show that a peer review participant knew that the allegations against the physician that led to his suspension or

non-renewal were false, or acted with reckless disregard for the falsity of those allegations. *Id.*

The allegations that led to Dr. Benson's non-renewal were the concerns identified in the ACOG report. So in order to raise a fact issue as to malice, Plaintiffs must produce evidence that Defendants knew that the allegations in the ACOG report were false, or acted on them with reckless disregard for whether or not they were false.

A plaintiff can attempt to raise a fact issue with direct evidence of malice, or by demonstrating "inadequate investigation coupled with the presence of ulterior motives," *Poliner v. Tex. Health Sys.*, 2003 WL 2225567, at *15 (N.D. Tex. Sept. 30, 2003). In this case, Plaintiffs have attempted both showings.

A. Direct Evidence of Malice

Plaintiffs, in their motion to amend or alter judgment, have identified several pieces of evidence that they believe constitute direct evidence that Defendants knew the allegations in the ACOG report were false, or acted on them with reckless disregard for their falsity. First, they argue that their expert, Dr. Victor Vines, opined that the ACOG conclusions were incorrect. Second, they maintain that ACOG reviewed a disproportionate number of Dr. Benson's charts. Third, they argue that, before the ACOG review, Defendants gave interviews to the ACOG reviewers in which they made false statements about Dr. Benson. Finally, they contend that Defendants rescored charts belonging to other OB/GYNs after the ACOG review, but did not rescore any of Dr. Benson's charts. Each of these arguments will be examined.

First, Plaintiffs proffer Dr. Vines's expert report and vehemently argue that the Court was wrong to state that Plaintiffs did not submit evidence that ACOG's conclusions regarding Dr. Benson were incorrect. The Court admits that it overlooked Dr. Vines's testimony in its previous Memorandum and Order, but this can be explained by the fact that Plaintiffs do not appear to have cited Dr. Vines's testimony in their briefing on the TMPA immunity issue. Regardless, one paragraph of the Court's previous opinion may have over-emphasized the importance of the actual truth or falsity of the underlying allegations. Whether the allegations were, in fact, false is a separate and distinct question from whether *Defendants* knew that the allegations were false or acted in reckless disregard for whether or not they were false. So while the Court now acknowledges that Plaintiffs have indeed offered evidence, in the form of Dr. Vines's expert report, that ACOG's conclusions were false, it must conclude that this evidence is nevertheless insufficient to raise a factual issue as to whether *Defendants* knew that they were false or acted with reckless disregard for whether or not they were false. The Court is hopeful that this explanation alleviates any confusion caused by its previous Memorandum and Order.

The second piece of evidence that Plaintiffs maintain constitutes direct evidence of malice is the fact that ACOG reviewed a disproportionate number of Dr. Benson's charts. The ACOG team reviewed 111 patient charts, out of which 100 belonged to OB/GYNs. Sixteen of those 100 charts belonged to Dr. Benson. That was three charts more than were reviewed for any other OB/GYN, and ten charts more than were reviewed for sixty percent of the OB/GYNs included in

the study. This evidence does not suggest to the Court, however, that Defendants knew that ACOG's findings based on those sixteen charts would be false. Nor does it suggest that Defendants believed that the findings might be false, but acted in reckless disregard of that belief. In fact, providing reviewers with a larger sample of charts for a particular physician could just as easily be an advantage to that physician as a disadvantage. Thus, any disparity in the number of charts reviewed is not sufficient to create a fact question on the issue of actual malice.

The third piece of evidence cited by Plaintiffs as direct evidence of malice is that, before the ACOG chart review commenced, some physicians gave interviews to ACOG investigators in which they made allegedly false statements about Dr. Benson and his patient care. As a result of these interviews, Dr. Benson became the subject of the "focused physician" section of the ACOG report, unbeknownst to Dr. Benson. However, even if the Court assumes that all of the information provided to ACOG in these interviews was indeed false, it is not persuaded that Plaintiffs have provided enough evidence for a jury to conclude by a clear and convincing standard that those individuals who gave the interviews *knew* that the information they provided was false. Nor, more importantly, have they provided sufficient evidence that those who eventually voted to non-renew Dr. Benson knew, or even suspected, that the allegations in the "focused physician" section were false. The Court does not decide, were the evidentiary standard a mere preponderance, whether this evidence would be sufficient to raise a fact question regarding malice. But here, a presumption operates that Defendants acted without malice, and Plaintiffs must overcome that

presumption by clear and convincing evidence. For that statutory presumption to serve its purpose, a plaintiff must be held to a higher evidentiary burden at the summary judgment stage as well. As a result, the Court must conclude that the interviews and "focused physician" section of the ACOG report do not raise a fact issue regarding actual malice.

Finally, the fourth piece of evidence offered by Plaintiffs as evidence of malice is that, after the ACOG review, Defendants "rescored" several charts belonging to other OB/GYNs but did not "rescore" or reexamine Dr. Benson's charts. Plaintiffs argue that this demonstrates that Defendants knew the ACOG scores were incorrect, but consciously chose not to correct Dr. Benson's scores so that they could be used against him. While it is true that Defendants reevaluated and applied a more favorable rating to eighteen charts that had been reviewed by ACOG, this was merely eighteen out of the 111 total charts reviewed. On its face, the reevaluation of a relatively small percentage of charts does not indicate that Defendants knew that ACOG's conclusions were uniformly incorrect. Nor does it indicate that the ACOG conclusions were so consistently flawed that failure to reevaluate each and every chart constitutes reckless disregard. Quite the contrary, that Defendants chose not to alter 84% of the charts could be interpreted as significant validation of ACOG's scoring. Again, the Court does not express an opinion as to whether this evidence would be sufficient to raise a question of fact were the applicable standard a mere preponderance, but it is not sufficient to raise a question of fact regarding actual malice where a clear and convincing standard applies.

B. Inadequate Investigation Plus Ulterior Motives

Plaintiffs also argue that they have raised a question of fact regarding actual malice by demonstrating an "inadequate investigation coupled with the presence of ulterior motives," *Poliner*, 2003 WL 2225567, at *15. The Court is persuaded that Plaintiffs have adduced sufficient evidence to establish ulterior motives by clear and convincing evidence, but clear and convincing evidence of inadequate investigation is lacking.

Plaintiffs first attempt to establish an inadequate investigation through word play. They argue that Defendants have admitted that they did not conduct an "investigation," because if they had, then the Hospital by-law protections would have been triggered. But the word "investigation" as used in the by-laws is a term of art that does not necessarily have the same meaning as an investigation in the colloquial sense. The Court believes that the word "investigation" as it is used in case law does not require the equivalent of an "investigation" under the by-laws.

Second, Plaintiffs argue that an inadequate investigation is established by the fact that the MEC did not conduct their own review of the ACOG findings. The Court believes, however, that the MEC was entitled to rely on the ACOG report and was not required undertake an additional investigation of the ACOG investigation. It was not unreasonable or inadequate for the MEC to rely on the findings of external reviewers. Indeed, if Plaintiffs do believe that local physicians had ulterior motives vis-à-vis Dr.

Benson, the use of external reviewers would be to Dr. Benson's advantage.

Third, Plaintiffs maintain that there was an inadequate investigation because Dr. Benson was not told that he was the "focused physician" and was not given an opportunity to respond to the allegations against him. Not being given the opportunity to address the charges against oneself traditionally raises due process concerns, but the case law requires only that the Hospital conduct an adequate *investigation*—not necessarily a hearing subject to all due process guarantees. Thus, the fact that Dr. Benson was not given the chance to dispute the ACOG report before the vote to non-renew his privileges does not amount to clear and convincing evidence that the investigation itself was inadequate.

Finally, Plaintiffs attempt to demonstrate that the investigation was inadequate with an affidavit by Dr. Garth Morgan that was not part of the summary judgment record. (Pls.' Mot. Alter Ex. D.) Defendants object to the introduction of this new evidence at this stage of the proceedings. The Court notes Defendants' objection, but will consider the affidavit. Dr. Morgan testified that, prior to the ACOG review, he was told by a fellow physician at the Hospital that Dr. Benson "would soon be facing lots of trouble and possibly losing his privileges . . . ." (Pls.' Mot. Alter Ex. D.) Dr. Morgan also testified that he was told "St. Joseph's, and several physicians at the Brazos Valley Women's Center . . . were planning on making sure that Dr. Benson's privileges were not renewed" and that "they 'had something' on Dr. Benson and that they intended on removing him from practice privileges at St. Joseph's." (Pls.' Mot. Alter Ex. D.) This testimony,

however, goes to Defendants' ulterior motives, rather than the adequacy of the investigation. Thus, Dr. Morgan's affidavit is not sufficient to demonstrate an inadequate investigation.

In sum, Plaintiff has not produced sufficient evidence to permit a jury to conclude by a clear and convincing standard that Defendants' investigation of Dr. Benson was inadequate. Plaintiff has also failed to produce sufficient direct evidence of actual malice to raise a fact question. Thus, the Court's previous ruling stands, and Plaintiff's motion to alter or amend this portion of the March 22, 2007, Memorandum and Order is **DENIED**.

IV. ANTITRUST

In its previous Memorandum and Order, the Court granted Defendants' motion for summary judgment on Plaintiffs' antitrust claims. Plaintiffs now argue that the Court committed a clear error of fact in ruling that Dr. Benson failed to produce evidence of an injury to competition in general. The Court is of the opinion that Plaintiffs' arguments on this topic were adequately addressed in its prior ruling, however, and will not rehash them here.

For the first time, Plaintiffs argue that Dr. Benson was offering three procedures not offered locally by any other physician. Aside from the tardiness of this argument, the fact remains that anyone seeking such procedures could, at all times, still be treated by Dr. Benson. That additional costs might be involved for that limited subclass of persons who wanted to be treated by Dr. Benson but whose insurance carriers had exclusive arrangements with St. Joseph does not

establish a market-wide anti-competitive effect. As the Fifth Circuit explained in *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, not only could such patients still use Dr. Benson at higher out-of-network prices if they desire, but, critically, the purchasers of health care plans are free to choose a plan without an exclusive St. Joseph arrangement. 123 F.3d 301, 311 (5th Cir. 1997). Thus, patient choice is not adversely affected, and the fact that only a small subclass of the market might be facing increased prices does not suggest to the Court an injury to competition in the market as a whole.

The Court's previous ruling on Plaintiffs' antitrust claims stands, and Plaintiffs' motion to alter or amend this portion of the March 22, 2007, Memorandum and Order is also **DENIED**.

V. MOTION FOR LEAVE TO AMEND

Finally, Plaintiffs seek leave to amend their complaint to assert a cause of action for breach of contract arising from the MEC's October 2001 decision to reduce Dr. Benson's privileges to six months after previously approving his application for a two-year period. Previously, Plaintiffs argued that this decision constituted a "professional review action" for purposes of federal immunity analysis under the Health Care Quality Improvement Act ("HCQIA"), and the Court considered and rejected this argument. Allowing the Plaintiffs another bite at the apple to assert a different legal theory at this stage of the litigation would cause undue prejudice to Defendants. In addition, there has been undue delay in seeking this leave to amend because the document that reflects this decision was produced to Plaintiffs on September 30, 2005.

Furthermore, leave to amend the complaint would be futile because the breach of contract action is barred by the four year statute of limitations. *See Tex. Civ. Prac. & Rem. Code* § 16.004 (Vernon 2004). Thus, Plaintiffs' motion for leave to amend is **DENIED**.[1]

VI. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Alter or Amend Judgment is **DENIED**. Plaintiffs' Motion to Amend Pleading is also **DENIED**.

IT IS SO ORDERED.

SIGNED this 22nd day of August, 2007.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT

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[1] Plaintiffs also object, though without a motion, to new evidence that Defendants attached as Exhibits in response to Plaintiffs' Motions. The Court did not consider those Exhibits and they are STRICKEN.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-4323

[Filed March 22, 2007]

ROYAL BENSON, M.D. and BENSON OB/GYN CENTER, P.A.,	)
Plaintiffs,	)
v.	)
ST. JOSEPH REGIONAL HEALTH CENTER, et al.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court are numerous motions for summary judgment and partial summary judgment brought by both Plaintiffs and Defendants. For the reasons set forth below, Defendants St. Joseph's et al.'s Motion for Summary Judgment and Counterclaim for Litigation Expenses (Doc. # 201), and Physician Defendants' Motion for Summary Judgment (Doc. # 203) are **GRANTED IN PART** and **DENIED IN**

PART. Plaintiffs' state law claims are **DISMISSED WITH PREJUDICE**. Defendants St. Joseph's et al.'s Motion for Partial Summary Judgment on Plaintiffs' Antitrust Claims (Doc. # 243) and Physician Defendants' Motion for Partial Summary Judgment on Plaintiffs' Antitrust Claims (Doc. # 248) are **GRANTED**. All other pending motions are **DENIED AS MOOT**.

I. BACKGROUND

This case arises out of the decision of St. Joseph Regional Health Center ("SJRHC" or "Hospital") to non-renew the clinical privileges of Royal Benson, M.D., a doctor of obstetrics and gynecology ("OB/GYN"), in March 2002. Dr. Benson filed suit against the Hospital and several Hospital employees and physicians who participated in the Hospital's peer review process alleging antitrust violations, breach of contract, tortious interference with existing and prospective contracts, defamation, and business disparagement. The defendants remaining in the action at this time are four institutional entities,[1] five Hospital employees,[2] and seven physicians ("Physician Defendants").[3]

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[1] SJRHC, St. Joseph Services Corporation d/b/a St. Joseph Health System, Franciscan Services Corporation, and Sisters of St. Francis of Sylvania, Ohio.

[2] Daniel Buche, Sister Gretchen Kunz, Myesha Nichols-Turner, R.N., Alan C. Smith, and Kathleen A. Thomas.

[3] Betty Acker, M.D., Thomas W. Davis, M.D., Daniel Dawson, M.D., David R. Doss, M.D., Robert H. Emmick, Jr., M.D., G. Mark Montgomery, M.D., and William F. Price, M.D.

The relevant narrative begins in January 1992 when Dr. Benson joined the Brazos Valley Women's Center ("BVWC") as an associate OB/GYN. Around that same time, Dr. Benson first obtained privileges to practice in the Department of Obstetrics and Gynecology at SJRHC. Clinical privileges at SJRHC are granted on a two-year basis, and application for reappointment is required at the end of each term.

Dr. Benson practiced at the BVWC as an associate for four and one-half years before becoming the third partner in the practice. In 1997, however, there was apparently a falling out between Dr. Benson and some of the other BVWC physicians, and Dr. Benson was asked to leave the practice.

After an acrimonious departure from the BVWC, Dr. Benson formed his own practice, Benson OB/GYN Center, P.A., which is a plaintiff in this case. He also continued to exercise his privileges at SJRHC, which had been continually renewed every two years. However, in 1999, the Hospital began documenting concerns about the quality of care provided by Dr. Benson. He became the subject of frequent peer review by the chairs of the OB/GYN Department and the OB Review Committee.

Dr. Benson's regular clinical privileges were set to expire in September 2001. Just one month earlier, the Hospital's Medical Executive Committee ("MEC") had voted to request an outside review of the Obstetrics Department by a survey team from the American College of Obstetricians and Gynecologists ("ACOG"), so the Hospital's Credentials Committee recommended that all physicians in the OB/GYN department who applied for reappointment in September 2001 be

reappointed for six months, rather than the typical two years, pending the results of the ACOG survey. On December 4, 2001, Dr. Benson was informed by letter that his application for reappointment had been approved for six months pending the ACOG team's findings (Physician Defs.' Mot. Summ. J. Ex. 7).

The ACOG team conducted a review of the quality of care of St. Joseph's OB/GYN Department between November 15 and 18, 2001, and reported its findings in January 2002 (Physician Defs.' Mot. Summ. J. Ex. 28). The OB/GYN Department then created an Ad Hoc ACOG Review Committee to review the ACOG report and make recommendations. The ACOG report was critical of Dr. Benson, and as a result, the Ad Hoc ACOG Review Committee recommended to the Hospital's Credentials Committee that Dr. Benson's privileges not be renewed. The Credentials Committee then recommended to the MEC that Dr. Benson not be reappointed.

On March 7, 2002, Dr. Benson was asked to participate in a MEC discussion of the portions of the ACOG report pertaining to him (Physician Defs.' Mot. Summ. J. Ex. 32). That discussion took place on March 14, 2002, and Dr. Benson was afforded the opportunity to address a number of criticisms contained in the ACOG report. After the meeting, a doctor on the MEC allegedly assured Dr. Benson that "everything will turn out alright" (Royal Benson Aff. ¶ 48).

On March 19, 2002, however, the MEC voted to recommend non-renewal of Dr. Benson's privileges and to forward this recommendation to the Hospital's Governance Council. Dr. Benson was notified of the MEC's recommendation by letter on March 21, 2002,

and was told that he had a right to request a hearing on the matter (Physician Defs.' Mot. Summ. J. Ex. 33). His six-month reappointment privileges expired four days later, on March 25, 2002, after which date Dr. Benson could no longer practice at SJRHC.

Dr. Benson did request a hearing regarding his non-renewal, and fourteen hearing sessions were conducted between July 9, 2002, and April 16, 2003. After the hearings, the MEC again voted to recommend that Dr. Benson not be reappointed. Dr. Benson sought appellate review before the St. Joseph Governance Council, which, on November 15, 2004, voted to reappoint Dr. Benson for one year subject to a set of conditions. Dr. Benson's new privileges took effect on April 6, 2005, after more than three years of inability to practice at SJRHC.

Dr. Benson argues that the peer reviews and the decision to non-renew his privileges were tainted by the participation of several physicians with connections to the BVWC who held personal grudges against him. He is seeking, *inter alia*, lost profits damages for the time he was unable to practice at SJRHC, as well as damages for emotional distress. Defendants maintain that participants in a peer review process are immune from suits for damages under both federal and state law, and have moved for summary judgment on this ground, as well as on the merits of each of Plaintiffs' substantive claims.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to

judgment as a matter of law based on the evidence thus far presented. *See* Fed. R. Civ. P. 56(c). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (internal quotation marks omitted). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could enter a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This Court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.* at 255.

III. QUALIFIED IMMUNITY

All Defendants have moved for summary judgment on the ground that participants in a peer review process are immune from damages liability under the federal Health Care Quality Improvement Act ("HCQIA") and the Texas Medical Practices Act ("TMPA"). If the requirements for HCQIA immunity are met, then the peer review participants cannot be liable in damages under federal or state law. If the requirements for TMPA immunity are met, then the peer review participants are immune from all civil liability under state law.

A. HCQIA

HCQIA provides immunity from damages for "professional review actions" that are taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a) (2006). A professional review action is presumed to meet these standards unless the presumption is rebutted by a preponderance of the evidence. *Id.* Thus, at the summary judgment stage, the burden is on a plaintiff to produce evidence that would allow a reasonable jury to conclude by a preponderance of the evidence that a professional review action failed to meet the HCQIA standards. *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 839 (3d Cir. 1999).

HCQIA defines a "professional review action" as

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or

> welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician.

42 U.S.C. § 11151(9) (2006). Dr. Benson contends that Defendants engaged in two distinct professional review actions that do not qualify for HCQIA immunity. The first, Plaintiffs urge, was the decision of the Credentials Committee in late 2001 to renew Dr. Benson's clinical privileges at SJRHC for only six months, rather than the typical two years. However, the parties offer vastly differing interpretations of this event. Dr. Benson argues that his application for reappointment in September 2001 was approved for two years, but that his privileges were then summarily interrupted and restricted to six months by the letter of December 4, 2001. Defendants, on the other hand, claim that Dr. Benson's September 2001 application for reappointment was never approved for two years. They maintain that the Credentials Committee decided to *extend* Dr. Benson's existing privileges, along with the privileges of three other physicians up for renewal in September 2001, for an additional six months to permit the ACOG survey to be conducted before making reappointment decisions.

The Court is persuaded that Defendants' interpretation of this event is the more likely scenario, given the fact that Dr. Benson was never informed that his application for reappointment had been approved for two years. Under this interpretation, the decision to extend Dr. Benson's privileges for six months does not constitute a professional review action because such an action, by definition, must

adversely affect clinical privileges; an extension of privileges is certainly not adverse.

Even if the Court were to operate under Dr. Benson's interpretation, however, and assume that his privileges were renewed for two years followed by a subsequent restriction to six months, that decision still would not constitute a professional review action under the statute. The definition of "professional review action" requires that the action be based on the competence of an individual physician. *Id.* Dr. Benson has provided no evidence that the Credentials Committee's decision to "restrict" the privileges of Dr. Benson *and the three other physicians* up for reappointment was based on an evaluation of their competence. In fact, that the decision was applied across the board to all OB/GYN physicians up for reappointment suggests that it was based on administrative, rather than competency, concerns. Because the decision to "restrict" Dr. Benson's privileges from two years to six months, if there was in fact such a decision, was not based on his individual competence, it does not constitute a professional review action for purposes of HCQIA.

The second professional review action that Plaintiffs identify is the MEC vote to recommend that Dr. Benson's privileges be non-renewed that occurred on March 19, 2002. Defendants agree that this recommendation constituted a professional review action for purposes of HCQIA, but contend that it met the four requirements for immunity. Plaintiffs bear the burden of overcoming the presumption that each of the four elements was satisfied.

In their Supplemental Brief on the HCQIA immunity issue, Plaintiffs appear to concede that, under the current state of the law and prevailing objective reasonableness standard,[4] they cannot produce sufficient evidence to overcome the presumption that Defendants satisfied the first, third, and fourth elements of HCQIA immunity. Plaintiffs urge this Court to reinterpret the meaning of "reasonable"as used in the statute so as to permit evidence of personal animosity by peer reviewers, but this Court is not inclined to say that nearly fifteen years of overwhelmingly uniform precedent on this point is wrong. Thus, it must conclude that Plaintiffs have not produced sufficient evidence to rebut the presumption that Defendants acted in the reasonable belief that the action was in furtherance of quality healthcare, after a reasonable effort to obtain the facts of the matter, and in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts.

Rather than attack Defendants' actions under the first, second, and fourth prongs of HCQIA immunity, Plaintiffs, in their Supplemental Brief, instead focus their argument on the third prong, contending that

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[4] See *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992), which explained that "the legislative history of § 11112(a) indicates that its reasonableness requirements were intended to create an objective standard rather than a subjective good faith standard." *Id.* at 734. The Court went on to conclude that, under such a standard, a physician's "assertions of hostility do not support his position because they are irrelevant to the reasonableness standards of § 11112(a). The test is an objective one, so bad faith is immaterial. The real issue is the sufficiency of the basis for the defendant's actions." *Id.*

adequate notice and hearing procedures were not afforded to Dr. Benson. HCQIA sets forth in detail certain "safe harbor" provisions that a health care entity must follow in order for its notice and hearing procedures to be deemed adequate as a matter of law. *See* § 1112(b). These safe harbor provisions require the health care entity, *inter alia*, to provide notice of the proposed action and to permit the physician to request a hearing on the matter. *Id.* All is not lost for the health care entity if it fails to meet the safe harbor provisions, however, as the third prong of HCQIA immunity can also be satisfied by "such other proceedings as are fair to the physician under the circumstances." § 11112(a)(3).

It appears to be undisputed that the procedures surrounding the MEC's vote to recommend non-renewal of Dr. Benson's privileges on March 19, 2002, did not fall within the bounds of the safe harbor provisions set forth in the statute. Dr. Benson was not given notice of the impending vote before the MEC's meeting, for instance, nor was he permitted to have a hearing with a lawyer present before the vote took place. Defendants themselves appear to acknowledge their failure to follow the safe harbor provisions, as they argue instead that the procedures leading up to the MEC's vote were fair under the circumstances. However, whether the procedures Dr. Benson received were fair under the circumstances is a classic jury question. *See, e.g.*, *Schindler v. Marshfield Clinic*, 2006 WL 2944703, at *16-17 (W.D. Wis. Oct. 12, 2006) ("Again, the issue is the reasonableness of the procedures afforded to plaintiff before his termination. Were they fair? Were they adequate? These are questions not amenable to resolution on summary judgment."); *Islami v. Covenant Med. Ctr., Inc.*, 822 F.

Supp. 1361, 1377-78 (N.D. Iowa 1992) ("For the court to say whether the proceedings were fair in the circumstances at this juncture would require the court to draw numerous inference and weigh the evidence of the parties; a process which is anathema to summary judgment decisions.").

While it is true that Defendants enjoy a presumption that their procedures were fair under the circumstances, the Court is persuaded that Dr. Benson has produced sufficient evidence for a jury to conclude that that presumption has been rebutted by a preponderance of the evidence. A jury may be of the opinion that it was unfair that Dr. Benson was not informed that there was going to be vote regarding his clinical privileges, or that he was not told that his privileges were at stake before he met with the MEC to discuss the ACOG findings on March 14, 2002. On the other hand, a jury might believe, as Defendants contend, that Dr. Benson was given ample opportunities to present his side of the story and should have known that there was going to be a vote on his clinical privileges by virtue of the fact that his existing privileges were only four days from expiration. Whether the procedures afforded Dr. Benson were fair under the circumstances is a fact question that must be determined by a jury.[5] Thus, because Plaintiffs have raised a question of fact regarding the third requirement for HCQIA immunity, Defendants' motion

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[5] The Court is mindful that, while unresolved subsidiary factual questions regarding HCQIA immunity may be submitted to a jury, the ultimate question of whether a defendant is entitled to HCQIA immunity is a question of law. *Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1332 (11th Cir. 1994).

for summary judgment on HCQIA immunity grounds must be **DENIED**.

B. TMPA

Defendants also contend that they are immune from civil liability for state law claims under the Texas Medical Practices Act, *Tex. Occ. Code* § 160.010(a)(2) (Vernon 2004). Texas has taken the additional step, authorized by HCQIA, of providing additional protection for medical peer review activity. The TMPA bestows immunity on a peer review participant as long as the participant "acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to the person." *Id.* There is a statutory presumption that the participant acted without malice, *Maewal v. Adventist Health Sys.*, 868 S.W.2d 886, 893 (Tex. App.—Fort Worth 1993, writ denied), so a plaintiff bears the burden of overcoming that presumption by clear and convincing evidence, *Monroe v. AMI Hosp. of Tex., Inc.*, 877 F. Supp. 1022, 1030-31 (S.D. Tex. 1994). Malice, for purposes of the TMPA, is defined as "knowledge that an allegation is false or [] reckless disregard for whether the allegation is false." *Johnson v. Hosp. Corp. of Amer.*, 95 F.3d 383, 395 (5th Cir. 1996) (citing *Maewal*, 868 S.W.2d at 893). Thus, the Fifth Circuit has explained that, in order to overcome the TMPA immunity presumption, a plaintiff must show that a peer review participant knew that the allegations against the physician that led to his suspension or non-renewal were false, or acted with reckless disregard for the falsity of those allegations. *Id.*

The allegations that led to Dr. Benson's nonrenewal were, according to the MEC's letter of March 21, 2002,

the concerns identified in the ACOG report (Physician Defs.' Mot. Summ. J. Ex. 33 at 1). The ACOG report indicated that sixteen of Dr. Benson's patient charts were reviewed, and all sixteen were rated unsatisfactory: three were found to have unsatisfactory documentation, two were cited for unsatisfactory management, and eleven were rated as unsatisfactory in both documentation and management (Physician Defs.' Mot. Summ. J. Ex. 28 at 19-35). The ACOG report concluded that Dr. Benson's charts exhibited a trend of "grossly inadequate documentation" (Physician Defs.' Mot. Summ. J. Ex. 28 at 41), and that there were consistent indications of inadequate care[6] (Physician Defs.' Mot. Summ. J. Ex. 28 at 43). The ACOG report also concluded that Dr. Benson appeared to be "unwilling or unable to accept peer review as an educational process" (Physician Defs.' Mot. Summ. J. Ex. 28 at 45). Because these are the allegations on which the MEC's decision to non-renew Dr. Benson was based, in order to raise a fact issue as to actual malice, Plaintiffs must produce evidence that Defendants knew that these allegations were false, or acted on them with reckless disregard for their falsity.

Plaintiffs argue that they have produced sufficient evidence to rebut the presumption that Defendants

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[6] Specifically, the ACOG report cited surgery that was not indicated, poor judgment in laproscopic procedures, not anticipating complications, poor clinical management demonstrating substandard care that does not reflect ACOG's guidelines, poor management potentially exposing the mother and infant to iatrogenic injury, and questionable surgery performed in a patient with a presumed absence of her gynecologic organs (Physician Defs.' Mot. Summ. J., Ex. 28 at 43).

acted without actual malice. They have offered evidence that Dr. Benson was treated more harshly than other physicians who committed similar conduct, which, they argue, demonstrates that Defendants knew that Dr. Benson was not incompetent. They also contend that the Defendants' actions were driven by ulterior motives, namely the alleged desire of the BVWC physicians to drive Dr. Benson out of practice. Finally, Plaintiffs offer the reports of their experts, Dr. William Winslade and Dr. John Dale Dunn, who opine that the peer review process was done in bad faith.

None of this evidence, however, suggests that the allegations in the ACOG report were false, much less that Defendants knew they were false or acted with reckless disregard for their falsity. In fact, Plaintiffs have never argued that the ACOG findings were false. They have argued that the process was unfair, biased, and motivated by vengeance, but they have never disputed ACOG's factual findings of inadequate documentation and patient care. Even if Dr. Benson was treated more harshly than other physicians who engaged in similarly deficient conduct, it would not establish that ACOG's findings that Dr. Benson exhibited inadequate documentation and patient care were false. Similarly, even if the peer review process was, in fact, motivated by vengeance, that would not constitute evidence that the allegations of inadequate documentation and patient care were untrue. Texas has taken the position in the TMPA that the actual motives underlying peer review actions are irrelevant as long as those actions are not based on false allegations; if a physician is truly deficient or incompetent, the law is not concerned with potential motives of his or her peer reviewers. Thus, Plaintiffs' evidence of disparate treatment and ulterior motives

is not sufficient to raise a fact question as to actual malice.

Similarly, the opinions of Plaintiffs' experts fail to create a fact question regarding actual malice. First, it should be noted that neither of the experts whom Plaintiffs offer on this issue are specialists in obstetrics or gynecology. Second, neither expert opines that ACOG's allegations of inadequate documentation and patient management were false. Dr. John Dale Dunn states that he is "not aware" of any prior "significant" disciplinary or peer review events against Dr. Benson, and that Dr. Benson has not had any "significant" malpractice problems (Expert Report of John Dale Dunn, M.D., J.D 3-4). This faint praise does not refute ACOG's factual findings. Dr. William J. Winslade states that Dr. Benson has had no malpractice verdicts against him (Expert Report of William J. Winslade, M.D., J.D. 4), but says nothing about whether malpractice cases were filed or settled. Dr. Winslade does state in vague generalities that Dr. Benson "achieved exemplary success" (Winslade Report 4), but offers by way of substantiation only the unsupported assertions that Dr. Benson had no bad outcomes and provided patient-centered care (Winslade Report 4). Dr. Winslade offers many opinions regarding Defendants' ulterior motives and the faulty peer review procedures, but as explained above, neither criticism has any bearing on the truth or falsity of the ACOG findings.

Plaintiffs attempt to survive the actual malice inquiry by relying on the premise that "inadequate investigation coupled with the presence of ulterior motives maybe sufficient to raise a fact issue as to actual malice." *Poliner v. Tex. Health Sys.*, 2003 WL

2225567, at *15 (N.D. Tex. Sept. 30, 2003). Plaintiffs argue that they have produced evidence that Defendants, particularly the BVWC physicians, had an ulterior motive to run Dr. Benson out of practice, and that the Hospital's investigation of Dr. Benson was inadequate because it was conducted in significant part by those harboring the ulterior motive. However, the ACOG survey on which the decision to non-renew Dr. Benson was based was conducted by an independent team of physicians from outside the Hospital who specialize in obstetrics and gynecology. None of the ACOG team members was personally familiar with Dr. Benson, and the team's chart study was a blind one, meaning that the treating physicians' names were removed before ACOG evaluation. Under these circumstances, it cannot reasonably be asserted that the ACOG study was an inadequate investigation. In those cases where courts have held that there was an inadequate investigation, the inadequacy is glaring. *See Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1333-34 (10th Cir. 1996) (noting that only two of the physician's charts were reviewed before his privileges were revoked); *Poliner*, 2003 WL 2225567 at *15 (citing a complete failure to investigate before summarily suspending physician's privileges). The facts of this case could not be more inapposite. Because the ACOG team's investigation of SJRHC's OB/GYN Department was independent and thorough, Plaintiffs cannot raise a fact issue as to actual malice by way of inadequate investigation and ulterior motives.

In sum, Plaintiffs have failed to provide sufficient evidence to overcome the presumption that Defendants did not act with malice in deciding to non-renew Dr. Benson's privileges. The allegations on which Dr. Benson's non-renewal was based were the ACOG

findings that Dr. Benson exhibited a pattern of inadequate documentation and patient management, and Plaintiffs have not produced any supportable evidence that those allegations were false. The evidence of disparate treatment and ulterior motives that Plaintiffs have produced is irrelevant to the actual malice inquiry because such evidence does not cast doubt on the veracity of the underlying allegations. The ACOG report was the result of a thorough, independent investigation of the entire OB/GYN department, and Dr. Benson's non-renewal was based on the negative evaluation of Dr. Benson's practice that it contained. Because there is no evidence that the ACOG allegations were false, or that Defendants knew they were false or acted with reckless disregard for their falsity, Defendants' motion for summary judgment on TMPA immunity grounds must be **GRANTED**. Plaintiffs' state law claims are therefore **DISMISSED WITH PREJUDICE**.

IV. ANTITRUST CLAIMS

Because Plaintiffs' state law claims are disposed of by Defendants' TMPA immunity, Plaintiffs' only remaining claims are the federal antitrust claims under the Sherman Act. Plaintiffs allege that Defendants engaged in a conspiracy to restrain trade in violation of Section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1 (2006). In addition, Plaintiffs allege that Defendants monopolized or attempted to monopolize the local OB/GYN market in violation of Section 2 of the Sherman Act. 15 U.S.C. § 2 (2006). All Defendants

have moved for partial summary judgment on Plaintiffs' antitrust claims.[7]

A. Standing

Defendants begin by challenging Plaintiffs' standing to bring the antitrust claims. Standing to pursue an antitrust suit exists only if a plaintiff shows: 1) injury-in-fact, that is, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997). First, Defendants argue that Dr. Benson fails the second standing prong because he has not suffered an antitrust injury. Second, Defendants contend that the third standing prong is also unsatisfied because Dr. Benson and his practice are not proper antitrust plaintiffs.

1. Antitrust injury

The Supreme Court has described the second antitrust standing prong, "antitrust injury," as

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect

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[7] Defendants St. Joseph's et al.'s Motion for Partial Summary Judgment on Plaintiffs' Antitrust Claims (Doc. # 243) and Physician Defendants' Motion for Partial Summary Judgment on Plaintiffs' Antitrust Claims (Doc. # 248).

> either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (quoting *Zenith Radio Corp. v. Hazeltine Res. Inc.*, 395 U.S. 100, 125 (1969)). The Fifth Circuit has emphasized the distinction between antitrust injury in the standing context and injury to competition, which is a component of substantive liability. *Doctor's Hosp.*, 123 F.3d at 305. Antitrust injury for standing purposes "should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." *Id.* A plaintiff need not establish a market-wide injury to competition as an element of standing. *Id.* The standing inquiry asks merely whether the plaintiff's alleged losses fall within the conceptual bounds of antitrust injury, regardless of the ultimate merits of the claim. *Id.* Mindful of this distinction, the Fifth Circuit has cautioned district courts against granting summary judgment on standing grounds when they really mean to say that no antitrust violation has occurred. *Id.* at 306.

In this case, Defendants argue that Dr. Benson has not met the antitrust injury standing requirement because he has not shown an adverse effect on quality of care, patient choices, or prices in the OB/GYN market in Brazos County. A number of other district courts faced with antitrust claims brought by physicians whose hospital privileges were revoked have granted summary judgment for defendants on standing grounds based on similar arguments. *See,*

e.g., *Ginzburg v. Mem'l Healthcare Sys., Inc.*, 993 F. Supp. 998, 1009 (S. D. Tex. 1997); *Baglio v. Baska*, 940 F. Supp. 819, 829-30 (W.D. Penn. 1996); *Leak v. Grant Med. Ctr.*, 893 F. Supp. 757, 763-64 (S.D. Ohio 1995); *Robles v. Humana Hosp. Cartersville*, 785 F. Supp. 989, 997-99 (N.D. Ga. 1992). However, this Court is mindful of the Fifth Circuit's admonition that the actual impact of a defendant's conduct on overall competition is better left to the merits determination. *See Doctor's Hosp.*, 123 F.3d at 306. Because the exclusion of a doctor from a hospital facility could theoretically result in decreased competition in the marketplace, and decreased competition is, conceptually, the type of injury the antitrust laws were intended to prevent, Dr. Benson has satisfied the second standing prong.

2. Proper antitrust plaintiff

Defendants argue that even if Plaintiffs establish a sufficient antitrust injury to survive the second standing prong, they still fail to satisfy the third standing requirement, which is proper plaintiff status. This requirement ensures that other parties are not better situated to bring suit. In determining the proper plaintiff, courts generally consider a number of factors, including (1) the directness of the asserted injury, that is, the chain of causation between the injury and the alleged unlawful restraint; (2) the nature of the harm; (3) the speculativeness of the alleged injury; (4) the difficulty of identifying damages and apportioning them among direct and indirect victims of the alleged conduct, in order to avoid duplicative recoveries; and (5) the causal connection between the violation and the harm. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983).

Defendants argue that if there was, in fact, decreased competition among OB/GYN doctors in Brazos County that resulted in decreased patient choice and increased prices, the proper parties to bring an antitrust suit would be patients and third-party payors. These would be the parties who would actually be injured by the Defendants' allegedly unlawful conduct. A number of district courts, considering the factors enumerated above, have agreed with this argument. *See, e.g.*, *Ginzburg*, 993 F. Supp. at 1020 ("Assuming . . . [that] the decrease in quality of care provided to Memorial patients and the reduction in patient choice options has in fact occurred, then it would be Memorial's patients and the third party payors, not [Dr.] Ginzburg, who are actually injured by Defendants' allegedly unlawful conduct."); *Baglio*, 940 F. Supp. at 830 ("It is these patients and the larger payor community who would be directly injured by the alleged antitrust violations, and therefore they must bring an action on their own behalf."); *Robles*, 785 F. Supp. at 999 ("two more easily imagined efficient enforcers in this case are obstetric patients and the government"). This Court, too, is persuaded that patients, insurance companies, or the government would all be better situated to bring suit for the injuries that Dr. Benson alleges have occurred. Dr. Benson argues, however, that these parties may not yet be aware of the injuries they are suffering, and hence Plaintiffs are in the best position to bring suit at this time. Rather than resolve this dispute, the Court will assume that Plaintiffs have standing to bring their antitrust claims and proceed to analysis on the merits, because, as explained below, both claims fail as a matter of law.

B. Section 1 of the Sherman Act

In order to prevail on a claim for unreasonable restraint of trade brought under Section 1 of the Sherman Act, a plaintiff must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market. *Johnson v. Hosp. Corp. of Amer.*, 95 F.3d 383, 392 (5th Cir. 1996). Defendants challenge Plaintiffs' claim on all three of these grounds. The most obvious deficiency in Plaintiffs' claim is the failure to produce any evidence of an anti-competitive effect to satisfy the second element, so the Court will begin there.

In order to determine whether the allegedly unlawful conduct of defendants produces some anti-competitive effect, courts apply the "rule of reason." *Doctor's Hosp.*, 123 F.3d at 307. This rule determines whether "the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition." *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458 (1986). Under the rule, a plaintiff must prove that the defendants' activities, on balance, adversely affected competition in the relevant product and geographic markets. *Id.* The adverse effect must be on competition in general, and "not just 'on any individual competitor or on plaintiff's business.'" *Ginzburg*, 993 F. Supp. at 1009 (quoting *Reazin v. Blue Cross & Blue Shield of Kan.*, 899 F.2d 951, 960 (10th Cir. 1990)).

In this case, Dr. Benson asserts that his exclusion from SJRHC resulted in decreased competition and available alternatives for patients. Specifically, Dr.

Benson alleges that because four insurance providers have exclusive contracts with SJRHC and only pay for procedures undertaken there, he lost numerous patients who could not afford the out of network insurance costs associated with having procedures performed at The College Station Medical Center.[8] But there are twenty-four insurance carriers providing coverage in Brazos County, and Dr. Benson was able to redirect the majority of his practice to The Med and The Physician's Centre. A patient who wanted to be treated by Dr. Benson was still able to choose his services at one of the alternate locations, and a patient who wanted to be treated at SJRHC could choose from more than twenty OB/GYN physicians with privileges there. The small number of patients who wanted to be treated by Dr. Benson but were covered by insurance with an exclusive SJRHC contract would still have been able to choose Dr. Benson's services if they wished. This is simply not evidence that patient alternatives were diminished in any way, or that there was any adverse effect on competition in the market as a whole.

Dr. Benson also attempts to demonstrate an adverse effect on competition with evidence that his deliveries fell from 123 in 2001 to 86 in 2003, while his hospital admissions fell from 314 in 2001 to 243 in 2003. He alleges that, as a consequence, he lost $1,119,617.58 in patient charges and payments between March 2002 and January 2007. While this

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[8] The College Station Medical Center (known as "The Med") is the only other full-service hospital in the Brazos County area. A third medical center, The Physician's Centre, provides facilities for gynecological procedures, but does not have facilities for obstetrics.

evidence suggests that his non-renewal had a negative impact on his individual practice, it has absolutely no bearing on competition in the market as a whole. Courts have repeatedly emphasized that the adverse effect must be on competition in general, not just on the plaintiff's individual business. *See, e.g.*, *Ginzburg*, 993 F. Supp. at 1009. None of Plaintiffs' evidence suggests that competition for OB/GYN services in Brazos County was adversely affected by Dr. Benson's non-renewal at SJRHC. Thus, Defendants' motions for summary judgment on Plaintiffs' Section 1 antitrust claim are **GRANTED**.

C. Section 2 of the Sherman Act

Plaintiffs also claim that Defendants are guilty of both attempted and actual monopolization in violation of Section 2 of the Sherman Act. Defendants have moved for summary judgment on both claims.

1. Attempted monopolization

To prevail on an attempted monopolization claim, a plaintiff must prove (1) predatory and exclusionary conduct by the defendants; (2) a specific intent of the defendants to monopolize the relevant market; and (3) a dangerous probability of the defendants achieving monopoly power. *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 839 (5th Cir. 2002) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Defendants argue that they did not engage in predatory conduct and had no intent to monopolize the market, but that even if they did, they did not have the *capacity* to monopolize the market. The Court agrees.

In order to demonstrate that defendants have the capacity to achieve, let alone a dangerous probability of achieving, monopoly power, a plaintiff must provide evidence that defendants possess some legally significant share of the market. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir. 1984) (going on to note that "a market share of less than ten percent, as a matter of law, usually will not support a finding of attempt to monopolize"). Here, however, Plaintiffs have not provided any evidence regarding the share of the Brazos County OB/GYN market possessed by Defendants. They allege that the Physician Defendants combined to serve a "significant portion" of the market (Pls.' Resp. to Defs.' Mot. Partial Summ. J. 38), but that assertion is not supported by any evidence. Plaintiffs' economic expert offered no opinion regarding the market power of Defendants. Without any evidence regarding Defendants' market power, Plaintiffs cannot raise a fact question regarding Defendants' capacity to achieve monopoly power. Thus, Plaintiffs' claim of attempted monopolization fails as a matter of law.

2. Actual monopolization

To establish actual monopolization, a plaintiff must show (1) the possession of monopoly power in the relevant market, and (2) that such power was willfully acquired, rather than developed as a consequence of a superior product, business acumen, or historic accident. *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1117 (5th Cir. 1984) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Monopoly power is "the power to control price or exclude competition." *Am. Airlines*, 743 F.2d at 1117 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351

U.S. 377, 391 (1956)). While the precise market share a defendant must control to be guilty of monopolization is unclear, the Fifth Circuit has remarked that, "absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization." *Domed Stadium Hotel*, 732 F.2d at 489.

In this case, Dr. Benson alleges that the Physician Defendants collectively, through their association with the BVWC, possess monopoly power in the OB/GYN market in Brazos County. But again, Plaintiffs have provided absolutely no evidence, either themselves or through their economic expert, of the market share controlled by these Physician Defendants. Without any evidence of the Physician Defendants' market share, there is no evidence that they possess monopoly power, and so Plaintiffs' actual monopolization claim against them fails as a matter of law.

Plaintiffs also allege that SJRHC possesses monopoly power with respect to hospital services in Brazos County. To support this assertion, Plaintiffs rely on evidence that, in 2001, SJRHC reported 2500 deliveries, while The Med, the only other hospital in the county with obstetrics facilities, reported just 645 deliveries. Even if this were evidence of a market share sufficient to constitute monopoly power, Plaintiffs have provided no evidence that this market share was the result of a willful acquisition rather than other, lawful factors—such as more expansive facilities, for instance. Thus, because Plaintiffs have not produced sufficient evidence to raise an issue of fact on each element of their actual monopolization claim against SJRHC, the claim fails as a matter of law.

All Defendants' motions for partial summary judgment on Plaintiffs' claims for attempted and actual monopolization under Section 2 of the Sherman Act are **GRANTED**.

V. CONCLUSION

Defendants are entitled to immunity from state civil liability under the TMPA, so Plaintiffs' state law claims must be dismissed. A fact issue exists as to whether Defendants are entitled to immunity from federal damages liability under HCQIA, but Plaintiffs' federal antitrust claims fail as a matter of law, so the HCQIA immunity issue need not be presented to a jury. Thus, Defendants St. Joseph's et al.'s Motion for Summary Judgment and Counterclaim for Litigation Expenses (Doc. # 201) and Physician Defendants' Motion for Summary Judgment (Doc. # 203) are **GRANTED IN PART AND DENIED IN PART**. Plaintiffs' state law claims are **DISMISSED WITH PREJUDICE**. Defendants St. Joseph's et al.'s Motion for Partial Summary Judgment on Antitrust Claims (Doc. # 243) and Physician Defendants' Motion for Partial Summary Judgment on Antitrust Claims (Doc. # 248) are **GRANTED**. All other pending motions are **DENIED AS MOOT**.

IT IS SO ORDERED.

SIGNED this 22nd day of March, 2007.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20726

[Filed August 27, 2009]

ROYAL BENSON, MD; BENSON OB/GYN CENTER, PA	)
	)
Plaintiffs - Appellants	)
	)
v.	)
	)
ST JOSEPH REGIONAL HEALTH CENTER; ST JOSEPH HEALTH SYSTEM; FRANCISCAN SERVICES CORPORATION; SISTERS OF ST FRANCIS OF SYLVANIA, OHIO; BETTY G ACKER, MD; DANIEL BUCHE; DR THOMAS W DAVIS, JR; DR DANIEL B DAWSON; DR DAVID R DOSS; DR ROBERT H EMMICK, JR; GRETCHEN KUNZ; DR G MARK MONTGOMERY; RN MYESHA NICHOLS-TURNER; DR WILLIAM F PRICE; ALAN C SMITH; KATHLEEN A THOMAS	)
	)
Defendants - Appellees	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CV-4323

ON PETITION FOR REHEARING

Before KING, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:

The petition for rehearing is denied. We have considered all of the arguments in the petition but limit our discussion to Benson's assertion that we failed to rule on one of the dispositive issues presented by the appeal.

The district court granted summary judgment with respect to Benson's state law claims after determining that the Defendants were entitled to immunity from civil liability under the Texas Medical Practice Act ("TMPA"). The district court explained that, under the TMPA, peer-review participants are presumed to have acted without malice. It then found that Benson could rebut that presumption only by presenting clear and convincing evidence of malice and that such evidence had not been presented.

On appeal, Benson's primary argument was that the district court utilized the wrong evidentiary standard. In particular, Benson maintained that a preponderance of the evidence standard – rather than a clear and convincing standard – applied. Our opinion

explained in detail that Benson did not properly preserve that alleged error for appellate review.

In passing, Benson's initial brief before this Court stated that "sufficient evidence exists to overcome either evidentiary standard, but the proper standard to be applied is preponderance of the evidence." The brief also recounted the relevant evidence in Benson's favor, but without specific application to either evidentiary standard.

Benson now argues that we failed to resolve whether the evidence he presented was sufficient to overcome the presumption against malice under the clear and convincing standard. As we were not presented with that as a specific issue, we did not discuss it. Though our opinion, like Benson's brief, did not expressly apply the evidence presented to the clear and convincing standard, we did articulate this holding: "The district court's grant of qualified immunity to the Defendants under the TMPA must therefore stand." Implicit in this holding was our acceptance of the district court's conclusion that Benson had not presented clear and convincing evidence of malice.

Benson's petition is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20726

[Filed August 27, 2009]

ROYAL BENSON, MD; BENSON OB/GYN CENTER, PA	)
	)
Plaintiffs - Appellants	)
	)
v.	)
	)
ST JOSEPH REGIONAL HEALTH CENTER; ST JOSEPH HEALTH SYSTEM; FRANCISCAN SERVICES CORPORATION; SISTERS OF ST FRANCIS OF SYLVANIA, OHIO; BETTY G ACKER, MD; DANIEL BUCHE; DR THOMAS W DAVIS, JR; DR DANIEL B DAWSON; DR DAVID R DOSS; DR ROBERT H EMMICK, JR; GRETCHEN KUNZ; DR G MARK MONTGOMERY; RN MYESHA NICHOLS-TURNER; DR WILLIAM F PRICE; ALAN C SMITH; KATHLEEN A THOMAS	)
	)
Defendants - Appellees	)

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 07/10/09, 5 Cir., _____, _____, F.3d _____)

Before KING, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX G

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 117. ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I. PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

42 U.S.C. § 11112. Standards for professional review actions

(a) In general.

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such

reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing.

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action.

The physician has been given notice stating--

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing.

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice.

If a hearing is requested on a timely basis under paragraph (1)(b)--

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)--

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right--

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right--

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies.

For purposes of section § 11111(a) of this title, nothing in this section shall be construed as--

(1) requiring the procedures referred to in subsection (a)(3) of this section--

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED

OCCUPATIONS CODE

TITLE 3. HEALTH PROFESSIONS

SUBTITLE B. PHYSICIANS

CHAPTER 160. REPORT AND CONFIDENTIALITY REQUIREMENTS

SUBCHAPTER A. REQUIREMENTS RELATING TO MEDICAL PEER REVIEW

Tex. Occ. Code Ann. § 160.010. Immunity From Civil Liability

(a) The following are immune from civil liability:

(1) a person who, in good faith, reports or furnishes information to a medical peer review committee or the board;

(2) a member, employee, or agent of the board, a medical peer review committee, or a medical organization committee, or a medical organization district or local intervenor, who takes an action or makes a recommendation within the scope of the functions of the board, committee, or intervenor program, if that member, employee, agent, or intervenor acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to that person; and

(3) a member or employee of the board or any person who assists the board in carrying out its duties or functions provided by law.

(b) A cause of action does not accrue against a member, agent, or employee of a medical peer review committee or against a health care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of medical peer review.

(c) A person, medical peer review committee, or health care entity that, without malice, participates in medical peer review or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from that act.

(d) A person or health care entity required to report to the board may not be found liable in a civil action for failure to report to the board unless the failure was committed knowingly or wilfully, except that the appropriate state licensing body may take action against a licensed person or entity for not reporting as required under this subtitle.

(e) A member of an expert panel under Section 154.056(e) and a person serving as a consultant to the board are immune from suit and judgment and may not be subjected to a suit for damages for any investigation, report, recommendation, statement, evaluation, finding, or other action taken without fraud or malice in the course of performing the person's duties in evaluating a medical competency case. The attorney general shall represent a member of an expert panel or consultant in any suit resulting

from a duty provided by the person in good faith to the board.

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 59. New Trial; Altering or Amending a Judgment

* * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.